

CUSTOMS BULLETIN AND DECISIONS

**Weekly Compilation of
Decisions, Rulings, Regulations, and Notices
Concerning Customs and Related Matters of the
U.S. Customs Service
U.S. Court of Appeals for the Federal Circuit
and
U.S. Court of International Trade**

VOL. 27

DECEMBER 29, 1993

NO. 52

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**DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE**

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U.S. Customs Service

Treasury Decisions

(T.D. 93-94)

DETERMINATION THAT MAINTENANCE OF DETERMINATION/ FINDING OF JULY 7, 1992, PERTAINING TO CERTAIN SOCKS IMPORTED FROM THE PRC IS NO LONGER NECESSARY

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Determination that merchandise is no longer subject to 19 U.S.C. 1307.

SUMMARY: On July 7, 1992, the Commissioner of Customs, with the approval of the Secretary of the Treasury issued a determination/finding that certain child or infant and adult socks, possibly identified and/or marketed under the "GOLDEN DOUBLE HORSE" brand name, and manufactured at the BEIJING QINGHE HOSIERY FACTORY, People's Republic of China, with the use of convict labor and/or forced labor, and/or indentured labor, were being, or were likely to be imported into the United States. The Commissioner of Customs, pursuant to 19 CFR 12.42(f) has now determined, based upon additional Customs investigation, that such merchandise is no longer being, or is likely to be imported into the United States in violation of Section 307 of the Tariff Act of 1930, as amended (19 U.S.C. 1307).

DATE: This determination shall take effect December 20, 1993.

FOR FURTHER INFORMATION CONTACT: Robert K. Neckel, Senior Special Agent, Office of Enforcement, Headquarters, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington D.C. 20229 (202) 927-1510.

DETERMINATION

Pursuant to Section 12.42(f), Customs Regulations (19 CFR 12.42(f)), it is hereby determined that certain articles of the People's Republic of China are no longer being, or likely to be, imported into the United

States, which were being mined, produced or manufactured with the use of convict, forced, or indentured labor.

| Articles | Item number from the Harmonized Tariff Schedule (19 U.S.C. 1202) |
|--|--|
| Child or infant socks | 6115.93.20209 (Textile Category 632) |
| Adult socks | 6115.92.20004 (Textile Category 332) |
| (Manufactured by the Beijing Qinghe Hosiery Factory) | |

Dated: November 15, 1993.

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: November 18, 1993.

JOHN P. SIMPSON,
Deputy Assistant Secretary (Enforcement).

[Published in the Federal Register, December 13, 1993 (58 FR 65235)]

(T.D. 93-95)

REVOCATION OF PERMIT TO OPERATE IN THE NORFOLK CUSTOMS DISTRICT ISSUED TO JOHN A. STEER, INC.

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that the permit issued to John A. Steer, Inc. to conduct Customs business in the Norfolk district has been revoked by operation of law pursuant to 19 CFR (111.45(b) due to the failure of the company to have a licensed individual within the district for a period of 180 days. This action is effective November 3, 1993.

Dated: December 8, 1993.

JERRY LADERBERG,
Director,
Office of Trade Operations.

[Published in the Federal Register, December 15, 1993 (58 FR 65618)]

19 CFR Parts 4 and 123

RIN 1515-AB31

(T.D. 93-96)

REPORTING REQUIREMENTS FOR
VESSELS, VEHICLES, AND INDIVIDUALS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to implement certain provisions of the Customs Enforcement Act of 1986, a part of the Anti-Drug Abuse Act of 1986, designed to strengthen Federal efforts to improve the enforcement of Federal drug laws and enhance the interdiction of illicit drug shipments. These regulatory changes pertain to the arrival, entry, and departure reporting requirements applicable to vessels, vehicles, and individuals, and inform the public regarding applicable penalty, seizure, and forfeiture provisions for violation of these requirements.

EFFECTIVE DATE: January 20, 1994.

FOR FURTHER INFORMATION CONTACT:

Operational matters: Joe O'Gorman, Office of Passenger Enforcement and Facilitation (202) 927-0530;

Legal matters: Larry L. Burton, Carrier Rulings Branch (202) 482-6940, or;

Penalty matters: Jeremy Baskin, Penalties Branch (202) 482-6950.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In 1986, Congress enacted the Anti-Drug Abuse Act of 1986 (21 U.S.C. 801 note) to, among other things, strengthen Federal efforts to improve the enforcement of Federal drug laws and enhance the interdiction of illicit drug shipments. Comprising part of this legislation was the Customs Enforcement Act of 1986 (19 U.S.C. 1654 note) (the Act), which amended certain provisions of the Tariff Act of 1930, codified in Title 19 of the U.S. Code, relating to arrival, entry, and departure reporting requirements applicable to individuals, vessels, and vehicles, and the penalty, seizure and forfeiture provisions applicable for violation of these requirements.

Section 433, Tariff Act of 1930, as amended (19 U.S.C. 1433), relating to the reporting requirements applicable to conveyances, was amended to provide that masters of vessels, operators of vehicles, and pilots of aircraft must immediately report their arrival at a designated Customs facility and remain there until granted permission to depart from the

arrival point. It was also amended regarding the discharge of passengers and/or merchandise (including baggage) and provides that these activities can only be accomplished in accordance with regulations prescribed by the Secretary of the Treasury. Further regarding conveyance reporting requirements, the Act amended § 401(k), Tariff Act of 1930, as amended (19 U.S.C. 1401(k)), to clarify that a vessel arriving in the U.S. after having visited a hovering vessel or receiving any merchandise from outside the territorial waters of the United States will be treated as if it is arriving from a foreign port or place, and added § 401(m) (19 U.S.C. 1401(m)), which provides, in general, that controlled substances imported into the United States are considered prohibited merchandise.

Section 459, Tariff Act of 1930, as amended (19 U.S.C. 1459), also relating to reporting requirements, was amended to provide that individuals arriving in the U.S. by whatever means must immediately report their arrival at a designated Customs facility and remain there until granted permission to depart from the arrival point. This change extends the reporting requirements applicable to individuals; formerly only persons importing or bringing merchandise into the country from a contiguous country were required to report to the port of entry or customhouse nearest the point where they crossed the border. It also places a reporting obligation on individuals arriving by conveyances in addition to the reporting obligation imposed on a ship's master, vehicle operator, or aircraft pilot.

Sections 436, 454, and 459, Tariff Act of 1930, as amended (19 U.S.C. 1436, 1454, and 1459), relating to the penalty provisions applicable for violations of the reporting requirements, were amended to provide for greater penalties.

The regulations implementing border-crossing reporting requirements and applicable penalty provisions are primarily found at Part 4, Customs Regulations (19 CFR Part 4), however, certain reporting requirements and penalty provisions are also contained in Part 123, Customs Regulations (19 CFR Part 123).

On November 3, 1988, Customs published a Proposed Rule in the Federal Register (53 FR 44459) that proposed certain amendments and revisions to sections in Parts 4, 101, 123 and 148 of the Customs Regulations and solicited comments in this regard. To effect the regulatory amendments regarding the reporting requirements applicable to conveyances, it was proposed to amend or revise §§ 4.0, 4.2, 4.2a, 4.3, 4.6, 4.9, 4.30, 4.50, 4.81, 4.84, 4.85, 4.87, 4.91, and 4.94, Customs Regulations (19 CFR §§ 4.0, 4.2, 4.2a, 4.3, 4.6, 4.9, 4.30, 4.50, 4.81, 4.84, 4.85, 4.87, 4.91, and 4.94) and to revise § 123.1 (19 CFR 123.1) to make clear the vessel master's obligation to report arrival immediately and to present such documentation to Customs officers as may be required to establish the obligation to report arrival and/or the fact of reported arrival into the United States of the vessel and any cargo, passengers, and/or crew from foreign ports and/or places.

To effect the regulatory amendments regarding reporting requirements applicable to individuals, it was proposed to add a new § 4.51 and to revise § 123.1 (19 CFR 123.1) to make clear an individual's separate obligation to report arrival immediately, no matter how the individual arrived in the United States.

To effect the regulatory amendments regarding the penalty provisions, it was proposed to amend or revise §§ 4.6 and 4.9 (19 CFR §§ 4.6 and 4.9), to add new §§ 4.3a and 4.52, and to amend or revise §§ 123.1, 123.2, and 123.9 (19 CFR 123.1, 123.2, and 123.9) to reflect the greater penalty provisions for violations of these reporting requirements.

Fourteen comments were received. The comments received, and Customs responses to them, are set forth below.

COMMENT ANALYSIS

The fourteen comments received raised four areas of concern: (1) whether district directors would be provided with additional discretionary authority to establish border-crossing points at places other than designated Customs ports of entry or stations; (2) the severity of the imprisonment penalties for violation of reporting requirements; (3) the imposition of advance reporting requirements concerning aircraft on short flights; and (4) the time-frame embraced by the term "immediately" in reporting to designated border-crossing points. We address these concerns in turn.

Comment:

Most of the comments concerned the changes to § 123.1, Customs Regulations (19 CFR 123.1), relating to the reporting requirements at designated border-crossing points on the Canadian and Mexican borders. These commenters suggested that, in order to avoid needless hardships in the form of adversely affecting the daily operations of remote border-crossing enterprises, discretionary authority should be given to district directors to designate authorized border-crossing points in addition to designated ports of entry and border stations. In this regard, some commenters referenced a 1949 fire control compact between several northeastern states and the Canadian province of Quebec that provides for firefighters from both countries to combat border fires, and they suggested that such mutually beneficial arrangements should be allowed to continue without regard to reporting requirements.

Customs response:

These comments appear to relate to the statutory and proposed regulatory use of the phrase "border-crossing points" and seem to be premised on the assumption that because the statute employed the phrase "border-crossing points" to describe where the reporting must occur, instead of using the more familiar terms "ports of entry" and "customs stations", Congress must have intended to create a third category of customs facility or location, namely "border-crossing points," that are distinguishable from ports of entry and Customs stations.

Customs does not agree with this reading of the statutory language, but rather believes that, by employing the term "border-crossing points", Congress was merely referring to the types of designated Customs locations and facilities that already exist under Part 101, Customs Regulations (19 CFR Part 101); there is no evidence to suggest that the phrase is used to connote or imply that a new type of Customs facility was intended to be created. Moreover, as regards the underlying concern motivating these comments, § 101.4(d) of the Customs Regulations specifically authorizes designation of Customs stations for a temporary time to provide Customs facilities where needed, which allows Customs to establish such other border-crossing points as may be required. Accordingly, such temporary operations as are provided for under the referenced fire control compact will not be adversely affected by implementation of these reporting requirements, as local district directors presently have the authority to allow border crossings for such activities. As the concern expressed is adequately provided for in the Customs Regulations already, it appears unnecessary to cede additional discretionary authority to the district director.

Comment:

A few comments expressed concern over the severity of the increased penalties provided for by the amendments. One commenter stated that the addition of § 4.3a to the Customs Regulations, relating to vessel entry violation penalties and providing for imprisonment—in addition to financial penalties—in cases where prohibited merchandise is discovered on board the ship, leaves masters without means of protection because modern cargo loading practices do not leave the master with total control over what is taken aboard his/her ship. Accordingly, it was recommended that the imprisonment penalty should not be imposed in cases where intent cannot be proved.

Customs response:

The proposed penalty provisions are those as set forth by Congress in the Act. Customs cannot change the fine amounts or imprisonment sanctions prescribed by Congress where enforcement is by criminal prosecution. Where enforcement is by civil penalty, however, situations warranting consideration of mitigating (or aggravating) circumstances will be handled on a case-by-case basis, pursuant to the provisions of 19 U.S.C. 1618 and 19 CFR Part 171.

It should be noted that, notwithstanding the specific civil and criminal penalty provisions provided for by the Act, other civil and criminal penalty provisions may be applicable. Thus, to eliminate the need to amend the regulations should the statutory penalty amounts be increased or decreased, the regulatory text has been revised by replacing specific civil and criminal penalty amounts with references to the applicable underlying statutory provision.

Comment:

One commenter expressed concern about the imposition of a "one-hour passenger rule" advance reporting requirement on aircraft engaged in short flights from remote places in Canada that do not have available reliable means for the giving of advance notice.

Customs response:

This comment addresses reporting requirements contained in the air commerce regulations, Part 122 of the Customs Regulations, 19 CFR Part 122, which are not the subject matter of this final rule.

Comment:

Several commenters voiced concern over how the term "immediate" would be interpreted regarding the reporting obligations for vehicles, vessels and/or individuals. It was suggested that the word should not be interpreted to mean the instant a vessel came to rest, as an overly strict requirement would be untenable.

Customs response:

The Act requires that reports of arrival be made to Customs "immediately." Thus, bearing in mind the purpose of the Anti-Drug Abuse Act of 1986, a reasonable interpretation of the term "immediately", within the context of reporting arrival into the U.S., would mean that such reporting should be accomplished as soon as possible and without undue delay, especially in the case of individual reporting obligations. This interpretation is based, in part, on the provision in § 433 pertaining to time extensions for vessel reporting: although the Secretary of the Treasury may, by regulation, extend the time in which reports of arrival must be made for vessel reporting, no extension of time greater than 24 hours after arrival is authorized. No such time extension provisions are provided for vehicles or individuals. Thus, an as-soon-as-possible/without-undue-delay standard is deemed reasonable for purposes of interpreting this statutory requirement.

CONCLUSION

Accordingly, as no material issues were raised that are not adequately addressed by existing regulations or by reasonable interpretations of the proposed regulations, Customs has decided to finalize the amendments as proposed, with minor editorial changes, such as substituting the word "phrase" in this Final Rule for the word "term" where more than one word was referenced. Also certain superseded legal requirements have been deleted, such as references to vessels of less than 5 net tons. In part 4, the editorial changes include the removal of certain footnotes that merely set forth statutory text implemented by the regulation, and end-of-section references to statutory authority already denoted in the general authority table at the beginning of the part, e.g., the statutory authority reference at the end of § 4.94(e). Also in part 4, footnotes that merely cross reference other Customs Regulation provisions are deleted, but the text of the section is revised to include the

cross reference, *e.g.*, footnote 16b to § 4.7(d)(1)(ii) merely cross references § 4.14(a)(1), thus, the footnote is deleted and the text is revised to carry the cross reference. Lastly concerning part 4, we are taking this opportunity to revise certain authority citations, incorrectly citing to 46 U.S.C., and to add authority citations for new section provisions, *i.e.*, §§ 4.3a, 4.51, and 4.52. In part 123, there is no longer an arrival reporting difference based upon whether vessels are less than or over 5 net tons or arrive otherwise than by sea. This is because 19 U.S.C. 1433 embodies the report of arrival requirements for all vessels and makes no distinction as to size. In regard to the proposed general authority citation changes to parts 101 and 148, they are no longer necessary, as they were accomplished in other published documents.

THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

For the reasons set forth in the preamble and because the main reporting imposition falls on individuals and vessels and vehicles operated by individuals, rather than on small entities as defined at 5 U.S.C. 601(6), pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), it is certified that the amendments will not have a significant impact on a substantial number of small entities. Accordingly, this final rule is not subject to the regulatory analysis or other requirements of 5 U.S.C. 604. Further, this document is not a "significant regulatory action," as defined in E.O. 12866.

PAPERWORK REDUCTION ACT

The collection of information in this final regulation, as provided for under § 24.5(f), has been reviewed by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act, 44 U.S.C. 3507, and approved, through November of 1996, under control number 1515-0203. The estimated annual burden per respondent/recordkeeper is 1 minute. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the U.S. Customs Service, Paperwork Management Branch, room 6316, 1301 Constitution Avenue, NW., Washington, D.C. 20229, or the Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503.

DRAFTING INFORMATION

The principal author of this document was Gregory R. Vilders, Regulations Branch. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 4

Cargo vessels, Coastal zone, Customs duties and inspection, Fishing vessels, Harbors, Imports, Maritime carriers, Merchandise, Passenger Vessels, Reporting and recordkeeping requirements, Seamen, Vessels, Yachts.

19 CFR Part 123

Canada, Customs duties and inspection, Freight, Imports, International boundaries, Mexico, Motor carriers, Railroads, Reporting and recordkeeping requirements, Vessels.

AMENDMENTS TO THE REGULATIONS

For the reasons stated above, Title 19, Chapter I, parts 4 and 123 of the Customs Regulations (19 CFR parts 4 and 123) are amended as set forth below:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority citation for part 4 amended by adding citations for §§ 4.3a, 4.51, and 4.52 and revising the other citations listed below to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C.App. 3.

* * * * *

Section 4.2 also issued under 19 U.S.C. 1433, 1441, 1486;

Section 4.3 also issued under 19 U.S.C. 288, 289, 1434–1436, 1441; 46 U.S.C. App. 91a, 110–112;

Section 4.3a also issued under 19 U.S.C. 1433, 1436;

* * * * *

Section 4.6 also issued under 19 U.S.C. 1585;

Section 4.7 also issued under 19 U.S.C. 1431, 1439, 1465, 1581(a), 1583; 46 U.S.C. App. 883a, 883b;

* * * * *

Section 4.9 also issued under 19 U.S.C. 1434, 1435, 1438; 42 U.S.C. 269; 46 U.S.C. App. 677;

* * * * *

Section 4.30 also issued under 19 U.S.C. 288, 1433, 1446, 1448, 1450–1454, 1490;

* * * * *

Section 4.50 also issued under 19 U.S.C. 1431; 46 U.S.C. 3502;

Section 4.51 also issued under 19 U.S.C. 1433;

Section 4.52 also issued under 19 U.S.C. 1433;

* * * * *

Section 4.81 also issued under 19 U.S.C. 1433, 1439, 1442, 1443, 1444, 1486; 46 U.S.C. App. 251, 313, 314, 883;

* * * * *

Section 4.84 also issued under 19 U.S.C. 1433, 1435, 1437; 46 U.S.C. App. 91, 313, 314, 883–1;

Section 4.85 also issued under 19 U.S.C. 1439, 1442, 1443, 1444, 1623;

* * * * *

Section 4.94 also issued under 19 U.S.C. 1433, 1434, 1435, 1441; 46 U.S.C. App. 91, 104, 313, 314;

* * * * *

2. Part 4 is amended by removing and reserving footnotes 4, 5, 7, 8, 8a, 9, 10, 11, 13, 14, 15, 16a, 16b, 19, 20, 23, 65, 72, 79, 91, 95, and 98.

3. Section 4.0 is amended by adding paragraph headings to paragraphs (a)–(e) and by adding paragraphs (f) and (g) to read as follows:

§ 4.0 General definitions.

(a) *Vessel*. * * *

(b) *Vessel of the United States*. * * *

(c) *Documented*. * * *

(d) *Noncontiguous territory of the United States*. * * *

(e) *Citizen*. * * *

(f) *Arrival of a vessel*. The phrase “arrival of a vessel” means that time when the vessel first comes to rest, whether at anchor or at a dock, in any harbor within the Customs territory of the U.S.

(g) *Departure of a vessel*. The phrase “departure of a vessel” means that time when the vessel gets under way on its outward voyage and proceeds on the voyage without thereafter coming to rest in the harbor from which it is going.

4. Section 4.2 is revised to read as follows:

§ 4.2 Reports of arrival of vessels.

(a) Upon arrival in any port or place within the U.S., including, for purposes of this section, the U.S. Virgin Islands, of any vessel from a foreign port or place, any foreign vessel from a port or place within the U.S., or any vessel of the U.S. carrying bonded merchandise or foreign merchandise for which entry has not been made, the master of the vessel shall immediately report that arrival to the nearest Customs facility or other location designated by the district director. The report of arrival, except as prescribed in § 4.2a of this part, or as supplemented in local instructions issued by the district director and made available to interested parties by posting in Customs offices, publication in a newspaper of general circulation, and other appropriate means, shall be made by any means of communication to the district director or to a Customs officer assigned to board the vessel. The Customs officer may require the production of any documents or papers deemed necessary for the proper inspection/examination of the vessel, cargo, passenger, or crew.

(b) For purposes of this part, “foreign port or place” includes a hovering vessel, as defined in 19 U.S.C. 1401(k), and any point in Customs waters beyond the territorial sea or on the high seas at which a vessel arriving in a port or place in the U.S. has received merchandise.

(c) In the case of certain vessels arriving either in distress or for the limited purpose of taking on certain supplies and departing within a 24-hour time period without having landed or taken on any passengers or other merchandise (see § 441(4), Tariff Act of 1930, as amended), the report may be filed by either the master, owner, or agent, and shall be in the form and give the information required by that statute, except that the report need not be under oath. A derelict vessel shall be consid-

ered one in distress and any person bringing it into port may report its arrival.

(d) The report of baggage and merchandise required to be made by certain passenger vessels making three or more trips a week between U.S. and foreign ports and vessels used exclusively as ferryboats carrying passengers, baggage, or merchandise (see § 441(2), Tariff Act of 1930, as amended), is in addition to the required report of arrival, and shall be made within 24 hours of arrival.

5. Section 4.2a(b) is amended by removing paragraph (1) and redesignating paragraphs (2) and (3) as (1) and (2) respectively.

6. Section 4.3 is amended by revising paragraphs (a) and (b) to read as follows:

§ 4.3 Vessels required to enter.

(a) Except as specified in § 441, Tariff Act of 1930, as amended, or as otherwise specified in this part, every American vessel arriving in the U.S. from a foreign port or place and every foreign vessel arriving at a port in the U.S. from another such port or from a foreign port or place shall make entry at the customhouse within 48 hours after arrival of a vessel, in accordance with § 4.9.

(b) For the purposes of the vessel entry requirement in this section and § 4.9, a "foreign port or place" includes a hovering vessel, as defined in 19 U.S.C. 1401(k), and any point in the Customs waters beyond the territorial sea or on the high seas at which a vessel arriving in a port or place in the U.S. has received merchandise, or a vessel on the high seas when the vessel arriving in the U.S. is returning from that vessel on the high seas after having transported merchandise out of the U.S. to the vessel on the high seas and there transhipped the merchandise to that vessel.

* * * * *

7. Part 4 is amended by adding § 4.3a to read as follows:

§ 4.3a Penalties for violation of vessel reporting and entry requirements.

Violation of the arrival or entry reporting requirements provided for in this part may result in the master being liable for certain civil and criminal penalties, as provided under 19 U.S.C. 1436, in addition to other penalties applicable under other provisions of law. The penalties include civil monetary penalties for failure to report arrival or make entry, and any conveyance used in connection with any such violation is subject to seizure and forfeiture. Further, if any merchandise (other than sea stores or the equivalent for conveyances other than a vessel) is involved in the failure to report arrival or entry, additional penalties equal to the value of merchandise may be imposed, and the merchandise may be seized and forfeited unless properly entered by the importer or consignee. The criminal penalties, applicable upon conviction, include fines and imprisonment if the master intentionally commits any viola-

tion of these reporting and entry requirements or if prohibited merchandise is involved in the failure to report arrival or make entry.

8. Section 4.6 is revised to read as follows:

§ 4.6 Departure or unlading before report or entry.

(a) No vessel which has arrived within the limits of any Customs district from a foreign port or place shall depart or attempt to depart, except from stress of weather or other necessity, without reporting and making entry as required in this part. These requirements shall not apply to vessels merely passing through waters within the limits of a Customs district in the ordinary course of a voyage.

(b) The "limits of any Customs district" as used herein are those defined in §§ 101.1(b) and 101.3(b) of this chapter, including the marginal waters to the 3-mile limit on the seaboard and the waters to the boundary line on the northern and southern boundaries.

(c) Violation of this provision may result in the master being liable for certain civil penalties and the vessel to arrest and forfeiture, as provided under 19 U.S.C. 1585, in addition to other penalties applicable under other provisions of law.

9. Section 4.9 is amended by revising paragraph (a) and adding paragraph (f) to read as follows:

§ 4.9 Formal entry.

(a) Section 4.3 provides which vessels are subject to formal entry and which are exempt from formal entry requirements. The formal entry of an American vessel from a foreign port or place (see § 4.3(b) of this part) shall be in accordance with § 434, Tariff Act of 1930 (19 U.S.C. 1434). The term "American vessel" means a vessel of the United States (see § 4.0(b)), as well as, when arriving by sea, a vessel entitled to be documented except for its size (see § 4.0(c) of this part). The formal entry of a foreign vessel arriving within the limits of any Customs district shall be in accordance with § 435, Tariff Act of 1930 (19 U.S.C. 1435). The required oath on entry shall be executed on Customs Form 1300.

* * * * *

(f) Any master who fails to make entry as required by this section or who presents any document required by this section which is forged, altered, or false, may be liable for certain civil penalties, as provided under 19 U.S.C. 1436, in addition to other penalties applicable under other provisions of law. Further, any vessel used in connection with any such violation is subject to seizure and forfeiture.

10. Section 4.30(a) is revised to read as follows:

§ 4.30 Permits and special licenses for unlading and lading.

(a) Except as prescribed in paragraph (f), (g), or (k) of this section or in § 123.8 of this chapter, and except in the case of a vessel exempt from entry or clearance under 19 U.S.C. 288, no passengers, cargo, baggage, or other article shall be unladed from a vessel which arrives directly or indirectly from any port or place outside the Customs territory of the

U.S., including the adjacent waters (see § 4.6 of this part), or from a vessel which transits the Panama Canal and no cargo, baggage, or other article shall be laden on a vessel destined to a port or place outside the Customs territory of the U.S., including the adjacent waters (see § 4.6 of this part) if Customs supervision of such lading is required, until the district director shall have issued a permit or special license therefore on Customs Form 3171.

* * * * *

11. Section 4.50(a) is revised to read as follows:

§ 4.50 Passenger lists.

(a) The master of every vessel arriving at a port of the United States from a port or place outside the Customs territory (see § 4.6 of this part) and required to make entry, except a vessel arriving from Canada, otherwise than by sea, at a port on the Great Lakes, or their connections or tributary waters, shall submit passenger and crew lists, as required by § 4.7(a) of this part. If the vessel is arriving from noncontiguous foreign territory and is carrying steerage passengers, the additional information respecting such passengers required by Customs and Immigration Form I-418 shall be included therein.

* * * * *

12. Part 4 is amended by adding § 4.51 under the heading "Passengers or vessels" to read as follows:

§ 4.51 Reporting requirements for individuals arriving by vessel.

(a) *Arrival of vessel reported.* Individuals on vessels, which have reported their arrival to Customs in accordance with 19 U.S.C. 1433 and § 4.2 of this part, shall remain on board until authorized by Customs to depart. Upon departing the vessel, such individuals shall immediately report to a designated Customs location together with all of their accompanying articles.

(b) *Arrival of vessel not reported.* Individuals on vessels, which have not reported their arrival to Customs in accordance with 19 U.S.C. 1433 and § 4.2 of this part, shall immediately notify Customs and report their arrival together with appropriate information regarding the vessel, and shall present themselves and their accompanying articles at a designated Customs location.

(c) *Departure from designated Customs location.* Individuals required to report to designated Customs locations under this section shall not depart from such locations until authorized to do so by any appropriate Customs officer.

13. Part 4 is amended by adding § 4.52 under the heading "Passengers or vessels" to read as follows:

§ 4.52 Penalties applicable to individuals.

Individuals violating any of the reporting requirements of § 4.51 of this part or who present any forged, altered, or false document or pa-

per to Customs in connection with this section, may be liable for certain civil penalties, as provided under 19 U.S.C. 1459, in addition to other penalties applicable under other provisions of law. Further, if the violation of these reporting requirements is intentional, upon conviction, additional criminal penalties may be applicable, as provided by under 18 U.S.C. 1459, in addition to other penalties applicable under other provisions of law.

14. Section 4.81 is amended by removing the phrase "within 24 hours" wherever it appears in paragraphs (e), (g)(1), and (g)(2) and adding, in its place, the phrase "immediately upon arrival".

15. Section 4.84 is amended by removing the phrase "report its arrival within 24 hours" wherever it appears in paragraphs (b) and (d) and adding, in its place, the phrase "immediately report its arrival".

16. Section 4.85 is amended by removing the phrase "report arrival and make entry within 24 hours" wherever it appears in paragraph (c) and adding, in its place, the phrase "immediately report its arrival and make entry within 48 hours".

17. Section 4.87 is amended by removing the phrase "shall report arrival within 24 hours" in paragraph (d) and adding, in its place, the phrase "shall immediately report arrival".

18. Section 4.91 is amended by removing the phrase "report arrival within 24 hours" wherever it appears in paragraph (b) and adding, in its place, the phrase "immediately report arrival".

19 and 20. Section 4.94(a) and the last sentence of § 4.94(c) are revised to read as follows:

§ 4.94 Yacht privileges and obligations.

(a) Any documented vessel with a pleasure license endorsement, as well as any undocumented American pleasure vessel, shall be used exclusively for pleasure and shall not transport merchandise nor carry passengers for pay. Such a vessel which is not engaged in any trade nor in any way violating the Customs or navigation laws of the U.S. may proceed from port to port in the U.S. or to foreign ports without clearing and is not subject to entry upon its arrival in a port of the U.S., provided it has not visited a hovering vessel, received merchandise while in the customs waters beyond the territorial sea, or received merchandise while on the high seas. Such a vessel shall immediately report arrival to Customs when arriving in any port or place within the U.S., including the U.S. Virgin Islands, from a foreign port or place.

(c) * * * Upon the vessel's arrival at any port or place within the U.S. or the U.S. Virgin Islands, the master shall comply with 19 U.S.C. 1433 by immediately reporting arrival at the nearest Customs facility or other place designated by the district director. Individuals shall remain on board until directed otherwise by the appropriate Customs officer, as provided in 19 U.S.C. 1459.

21. Section 4.94(d) is amended by removing the words "made within 24 hours, exclusive of any day on which the customhouse is not open for marine business," in the last sentence of the second paragraph of the cruising license form and substituting the words "immediately made."

22. The statutory citations in parenthesis following § 4.94(e) are removed.

PART 123—CUSTOMS RELATIONS WITH CANADA AND MEXICO

1. The authority citation for part 123 is amended, in part, to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1433, 1624, unless otherwise noted.

2. Section 123.0 is amended by revising the last sentence to read as follows:

§ 123.0 Scope

* * * The arrival of all vessels from, and clearance of all vessels departing for, Canada or Mexico are governed by the provisions of part 4 of this chapter.

3. Section 123.1 is revised to read as follows:

§ 123.1 Report of arrival from Canada or Mexico and permission to proceed.

(a) *Individuals.* Individuals arriving in the United States must report their arrival to Customs, and failure to report arrival may result in the individual being liable for certain civil and criminal penalties, as provided under 19 U.S.C. 1459, in addition to other penalties applicable under other provisions of law. The specific reporting requirements are as follows:

(1) *Individuals not arriving by conveyance.* Persons arriving otherwise than by conveyance may enter the U.S. only at those locations specified by the appropriate district director, and shall then immediately report their arrival to Customs. Such persons shall not depart from the Customs port or station until authorized to do so by the appropriate Customs officer.

(2) *Persons arriving aboard a conveyance that reported its arrival.* Persons aboard a conveyance the arrival of which has been reported to Customs at locations specified by the appropriate district director in accordance with §§ 1433 or 1644 of title 19, United States Code (19 U.S.C. 1433, 1644), or § 1509 of title 49, United States Code App. (49 U.S.C. App. 1509), shall remain on board until authorized by Customs to depart, and shall then immediately report to the designated Customs facility together with all articles accompanying them.

(3) *Persons arriving aboard a conveyance that has not reported its arrival.* Persons aboard a conveyance the arrival of which has not been reported in accordance with the laws referred to in paragraph (a)(2) of this

section, shall immediately notify a Customs officer and report their arrival, together with appropriate information concerning the conveyance on or in which they arrived, at a location or locations specified by the appropriate district director and shall present themselves and their property for Customs inspection and examination.

(b) *Vehicles*. Vehicles may arrive in the U.S. only at a designated port of entry (see § 101.3 of this chapter) or Customs station if the district director of the district in which the station is located authorizes entry at that station (see § 101.4 of this chapter). The person in charge of any such vehicle shall, immediately upon arrival of the vehicle in the U.S., report the arrival to Customs. No vehicle shall, after arriving in the U.S., depart or discharge any passenger or merchandise (including baggage) without authorization by the appropriate Customs officer.

(c) *Vessels*. For report of arrival requirements applicable to all vessels, regardless of tonnage, and arriving from any location, see §§ 4.2 and 4.2a of this chapter.

(d) *Method of reporting*. Report of arrival under paragraphs (a), (b), and (c) of this section shall be made in person unless the appropriate district director, by local instructions, requires that it be made by some other specific means. Such local instructions issued by the district director will be made available to interested parties by posting in Customs offices, publication in a newspaper of general circulation in the Customs district that supervises the location, and/or other appropriate means.

4. Section 123.2 is revised to read as follows:

§ 123.2 Penalty for failure to report arrival or for proceeding without a permit.

(a) *Persons*. Any person arriving otherwise than by conveyance who enters the U.S. at other than a designated port of entry, or Customs station if authorization exists for entry at that station, who fails to report arrival as required in § 123.1(a) of this part, or who departs from the port of entry or Customs station without authorization by the appropriate Customs officer, whether or not intentionally, shall be subject to such civil and criminal penalties as are prescribed under 19 U.S.C. 1459 and provided for in § 123.1 of this part.

(b) *Vessels*. The penalty provisions applicable to vessels for failure to report arrival or for proceeding without a permit are those as provided in § 4.3a.

(c) *Vehicles*. (1) *Civil penalties*. The person in charge of any vehicle who—

(i) Enters the vehicle into the U.S. at other than a designated port of entry, or Customs station if authorization exists for entry at that station;

(ii) Fails to report arrival and present the vehicle and all persons and merchandise (including baggage) on board for inspection as required in § 123.1(b) of this part;

(iii) Fails to file a manifest or any other document required to be filed in connection with arrival in the U.S. under this part; or

(iv) Without authorization by the appropriate Customs officer, removes such vehicle from the port of entry or Customs station or discharges any passenger or merchandise (including baggage) shall be subject to such civil penalties as are prescribed in § 436, Tariff Act of 1930, as amended (19 U.S.C. 1436), and any conveyance used in connection with any such violation shall be subject to seizure and forfeiture. The person also may be subject to an additional civil penalty equal to the value of the merchandise on the conveyance which was not entered or reported as required by § 123.1(b) of this part, and that merchandise may be subject to seizure and forfeiture unless properly entered by the importer or consignee. If the merchandise consists of any controlled substances, additional penalties may be assessed, as prescribed in § 584, Tariff Act of 1930, as amended (19 U.S.C. 1584).

(2) *Criminal penalties.* Upon conviction, any person in charge of a vehicle who intentionally commits any of the violations described in paragraph (c)(1) of this section shall, in addition to the penalties described therein, be subject to such additional criminal penalties as are prescribed in § 436, Tariff Act of 1930, as amended (19 U.S.C. 1436). If the vehicle has or is discovered to have had on board any merchandise (other than sea stores or the equivalent for conveyances other than vessels) the importation of which into the U.S. is prohibited, the person in charge of the vehicle is subject to such additional criminal penalties as are prescribed in § 436, Tariff Act of 1930, as amended (19 U.S.C. 1436).

5. Section 123.9 is amended by revising paragraph (a) and revising paragraph (d)(2) to read as follows:

§ 123.9 Explanation of a discrepancy in a manifest.

(a) *Provisions applicable — (1) Overages.* If any merchandise (including sea stores or its equivalent) is found on board a vessel or vehicle arriving in the U.S. that is not listed on a manifest filed in accordance with § 123.5 of this part, or after having been unladen from such vessel or vehicle, is found not to have been included or described in the manifest or does not agree therewith (an overage), the master, person in charge, or owner of the vessel or vehicle or any person directly or indirectly responsible for the discrepancy is subject to such penalties as are prescribed in § 584, Tariff Act of 1930, as amended (19 U.S.C. 1584), and any such merchandise belonging or consigned to the master, person in charge, or owner of the vehicle is subject to seizure and forfeiture.

(2) *Shortages.* If merchandise is manifested but not found on board a vessel or vehicle arriving in the U.S. (a shortage), the master, person in charge, or owner of the vessel or vehicle or any person directly or indirectly responsible for the discrepancy is subject to such penalties as are prescribed in § 584, Tariff Act of 1930, as amended (19 U.S.C. 1584).

(3) *Failure to file a manifest.* The master or person in charge of a vessel or vehicle arriving in the U.S. or the U.S. Virgin Islands who fails to present a manifest to Customs is liable for civil penalties as are provided by law, and the conveyance used in connection with the failure to file is subject to seizure and forfeiture. A criminal conviction for intentional

failure to file shall make the master or person in charge liable for criminal penalties, as provided by statute, and if any merchandise is found or determined to have been on board (other than sea stores or the equivalent for vehicles), the importation of which is prohibited, additional penalties may apply.

* * * * *

(d) *Action on the discrepancy report.*

* * * * *

(2) If the criteria in paragraph (d)(1) of this section are not met, applicable penalties under 19 U.S.C. 1584 shall be assessed.

* * * * *

6. Section 123.9 is further amended by removing the reference to "19 U.S.C. 1460 or" in paragraphs (d)(3), (e) and (f).

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: May 27, 1993.

RONALD K. NOBLE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, December 21, 1993 (58 FR 67312)]

U.S. Court of Appeals for the Federal Circuit

MARCEL WATCH CO., PLAINTIFF-APPELLANT *v.*
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 93-1194

(Decided December 8, 1993)

Patrick C. Reed, Freeman, Wasserman & Schneider, of New York, New York, argued for plaintiff-appellant. With him on the brief was *Bernard J. Babb*.

James A. Curley, Attorney, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Stuart E. Schiffer*, Acting Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Lieberman*, Attorney in charge, International Trade Field Office. Also on the brief was *Edward N. Maurer*, Office of Assistant Chief Counsel, U.S. Customs Service, New York, New York, of counsel.

Appealed from: U.S. Court of International Trade.

Judge AQUILINO, JR.

Before ARCHER, LOURIE, and CLEVINGER, *Circuit Judges*.

LOURIE, *Circuit Judge*.

Marcel Watch Company appeals from the judgment of the United States Court of International Trade granting in part and denying in part cross-motions for summary judgment on Marcel's challenge of the United States Customs Service's classification determination and duty assessment of merchandise imported by Marcel in 1982. *Marcel Watch Co. v. United States*, 795 F. Supp. 1199 (Ct. Int'l Trade 1992) (opinion and order). The trial court held that the merchandise at issue, consisting of quartz analog clocks with clock movements measuring less than 1.77 inches in width, is classifiable under Item 715.15 of the Tariff Schedules of the United States (TSUS) (1982) and dutiable at a combined rate consisting of the rate applicable to the clock movements as set forth in Item 720.14, TSUS, plus the rate applicable to the clock cases as set forth in Item 720.34, TSUS. We affirm.

BACKGROUND

The merchandise at issue, described as "quartz wall clocks" having a quartz analog movement measuring over 0.50 inches in thickness and less than 1.77 inches in width, entered the United States on September 24, 1982. Customs classified the merchandise as "Clocks: With watch movements; or with clock movements measuring less than 1.77 inches

in width" under Item 715.15, dutiable at "[t]he column 1 rate applicable to the cases, plus the column 1 rate applicable to the movements." Thus, the movements and cases of the imported clocks were constructively separated and the duties for those components were separately determined. Customs assessed a rate of 34 cents each for the clock movements under Item 720.02 and a rate of 11% *ad valorem* for the clock cases under Item 720.34. The entry was liquidated by Customs on November 5, 1982.

Marcel subsequently filed a protest with Customs challenging the classification of the imported merchandise. The protest was denied and Marcel paid the liquidated duties assessed. On November 1, 1983, Marcel commenced an action in the United States Court of International Trade contesting the denial of its protest.¹ 19 U.S.C. § 1514(a), 28 U.S.C. § 1581(a) (1988). Marcel claimed that the imported clocks were properly classifiable as "Electrical articles and electrical parts of articles, not specifically provided for: * * * Other" under Item 688.43, TSUS (as added by Exec. Order No. 12371, 3 C.F.R. 196 (1982)), dutiable at a rate of 4.9% *ad valorem*, or in the alternative, as "Machines not specially provided for, and parts thereof" under Item 678.50, TSUS, dutiable at a rate of 5% *ad valorem*.

On cross-motions for summary judgment, the trial court affirmed the classification of the merchandise under Item 715.15, rejecting Marcel's argument that the imported clocks were not classifiable under the provisions of Schedule 7. In reviewing the applicable duties assessed pursuant to that provision, the trial court affirmed Customs' determination that the rate of duty on the clock cases derived from Item 720.34. However, it disagreed with Customs' determination that the duty rate on the clock movements derived from Item 720.02. Instead, the court concluded that the clock movements should have been liquidated under Item 720.14, the provision covering "Other clock movements: * * * Valued over \$2.25 but not over \$5 each."

Marcel now appeals from the judgment of the trial court affirming Customs' decision to classify the imported clocks under Item 715.15 and assessing duties thereunder at the rates set forth in Items 720.14 and 720.34. We have jurisdiction under 28 U.S.C. § 1295(a)(5) (1988).

DISCUSSION

Our standards of appellate review regarding classification determinations are well settled. We review the trial court's grant of summary judgment for correctness as a matter of law. See *Lynteq, Inc. v. United States*, 976 F.2d 693, 696 (Fed. Cir. 1992). The ultimate issue as to whether particular imported merchandise has been classified under an appropriate tariff provision is a question of law subject to *de novo* review. *W.R. Filbin & Co., Inc. v. United States*, 945 F.2d 390, 392 (Fed. Cir. 1991). Resolu-

¹ The action was designated a test case by the trial court. See U.S. Ct. Int'l Trade R. 84(b). The complaint also challenged in a separate count the classification of merchandise described as "quartz alarm clocks" imported to the United States on May 18, 1982. That merchandise is not at issue here.

tion of that issue generally entails a two-step process of (1) ascertaining the proper meaning of specific terms within the tariff provision and (2) determining whether the merchandise at issue comes within the description of such terms as properly construed. The first step is a question of law which we review *de novo* and the second is a question of fact which we review for clear error. *Stewart-Warner Corp. v. United States*, 748 F.2d 663, 664-65, 3 Fed. Cir. (T) 20, 22 (1984). In reviewing classification determinations, Customs' classification of imported merchandise is presumed to be correct and the burden is on a party challenging the classification to overcome that presumption. See *Hasbro Indus., Inc. v. United States*, 879 F.2d 838, 840, 7 Fed. Cir. (T) 110, 112 (1989).

The clock movement provisions of TSUS, Schedule 7, Part 2, Subpart E (1982) ("Watches, Clocks, and Timing Apparatus"), read as follows:

Clock movements, assembled, without dials or hands, or with dials or hands whether or not assembled thereon:

Measuring less than 1.77 inches in width:

Not constructed or designed to operate for over 47 hours without rewinding:

720.02 Having no jewels or only 1 jewel

720.04 Having over 1 jewel

Constructed or designed to operate for over 47 hours without rewinding:

720.06 Having no jewels or only 1 jewel

720.08 Having over 1 jewel

720.09 If certified for use in civil aircraft

Other clock movements:

720.10 Valued over \$1.10 each

720.12 Valued over \$1.10 but not over \$2.25 each

720.14 Valued over \$2.25 but not over \$5 each

720.16 Valued over \$5 but not over \$10 each

720.18 Valued over \$10 each

Marcel maintains that the clocks do not fall within Schedule 7 as a matter of law because their movements are not classifiable under either Item 720.02, as found by Customs, or Item 720.14, as found by the trial court. Specifically, Marcel claims that the clock movements are not classifiable under Item 720.02 because that provision requires movements less than 1.77 inches in width to be capable of being wound and rewound. It is undisputed that the clock movements of the merchandise at issue here do not involve winding and rewinding. Marcel argues that neither are the clock movements classifiable under Item 720.14 because that provision only covers clock movements greater than or equal to 1.77 inches in width. It is undisputed that the clock movements are less than 1.77 inches in width.

In support of its contention that the clock movements at issue are not classifiable under Schedule 7, Marcel relies on the decision of the Court

of International Trade in *Belfont Sales Corp. v. United States*, 11 CIT 541, 666 F. Supp. 1568 (1987), which held that quartz analog wrist watches were not classifiable under the provisions of Schedule 7. Marcel argues that because the movements of the imported clocks are similar to the movements of the watches at issue in *Belfont* in all material respects except for size, *Belfont* precludes classification of the quartz analog clocks under Item 715.15.

The imported merchandise at issue in *Belfont* was collectively referred to as "quartz analog watch[es]." Customs classified the merchandise under Item 715.05, TSUS (1980) ("Watches"), which provides that duties are to be assessed on cases and movements separately. Accordingly, duties were assessed on the watch movements under Items 716.27 or 716.29, TSUS, depending on their width, and on the watch cases under Items 720.24 or 720.28, TSUS, depending on their composition. The importer in *Belfont* challenged Customs' classification determination, arguing that the watches were classifiable as "electrical articles" under Item 688.45, TSUS.

The court in *Belfont* first addressed the threshold issue whether the imported quartz analog watches contained "watch movements" according to Schedule 7. Upon concluding that they did, the court then addressed whether the watches were properly classified under Item 715.05 as determined by Customs. That issue turned on whether the movements of the watches could be classified under Schedule 7, because if they could not, then the watches themselves could not. See 11 CIT at 546, 666 F. Supp. at 1571-72.

The watch movement provisions of Schedule 7 (1980) consisted of Items 716.04-716.06, 716.10-716.44, and 719. The heading that governed Items 716.10-716.44 required that the movements be:

Not adjusted, not self-winding (or if a self-winding device cannot be incorporated therein), and not constructed or designed to operate for a period in excess of 47 hours without *rewinding*. [Emphasis added.]

Item 719 contained a similar limitation that the movements be "constructed * * * in excess of 47 hours without rewinding."

In view of the "rewinding" restriction governing all of the pertinent watch movement provisions of Schedule 7,² the trial court concluded that those provisions were necessarily limited to movements that were capable of being wound and rewound. The court found that the movements of the imported watches did not meet that limitation because they were battery operated and thus did not require winding and rewinding. Because the movements could not be classified under Schedule 7, the court concluded that the watches themselves could not be classified therein. Instead, the court held that the watches were properly classified under Item 688.45 of Schedule 6, TSUS. The court's decision in *Bel-*

² Items 716.04-716.06, governed by the subheading "Having over 17 jewels," were the only watch movement provisions not subject to a "rewinding" requirement. Apparently those items were not considered because the watches at issue in *Belfont* either had no jewels or did not have over 17 jewels.

font was affirmed on appeal "for the reasons stated in that court's published opinion." *Belfont Sales Corp. v. United States*, 878 F.2d 1413, 1413, 7 Fed. Cir. (T) 99, 100 (1989).

Despite the undisputed fact that the imported clocks at issue in the instant case are similar in construction and operate on the same principle as the movements of the watches at issue in *Belfont*, the trial court below concluded that *Belfont* was not dispositive of the classification issue. The court determined that the clock movement provisions of Schedule 7 were broader in scope than the watch movement provisions and that the imported clocks were properly classifiable in Schedule 7. Accordingly, the court held that although certain of the clock movement provisions of Schedule 7 contain the identical "rewinding" restriction at issue in *Belfont*, those provisions in Schedule 7 nevertheless contemplate battery-operated, non-winding movements. The court based that determination on its finding that in contrast to wrist watches, "winding and rewinding have not necessarily been integral to clocks, which date almost to the moment of recorded history itself." 795 F. Supp. at 1203. Additionally, the court considered the statistical annotations to Item 720.02 labeled "Electric: Battery operated" and "Electric: Other" as evidence that the clock movement provisions of Schedule 7 cover battery-operated movements.

We agree with the trial court that *Belfont* does not in and of itself preclude classification of the imported clocks within Schedule 7. However, we arrive at that conclusion by a route different from that taken by the trial court in reaching its decision. Resort to extrinsic aids in interpreting the provisions at issue is unnecessary where, as here, the statutory language clearly and unambiguously manifests congressional intent. See *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 788, 6 Fed. Cir. (T) 121, 124, cert. denied, 488 U.S. 943 (1988). Moreover, we may not resort to the statistical annotations to the TSUS in order to broaden the scope of the clock provisions subject to a "rewinding" limitation to include battery-operated movements that are not capable of being wound and rewound. The TSUS itself instructs that such annotations "are subordinate to the provisions of the legal text and cannot change their scope." General Statistical Headnote 2(c), TSUS (1982).

In resolving issues of statutory construction, we begin with the language of the statute. See *Lynteq, Inc. v. United States*, 976 F.2d 693, 696 (Fed. Cir. 1993). The clock movement provisions of the superior heading "Clock movements, assembled * * *" are subdivided into two inferior headings: "Measuring less than 1.77 inches in width" and "Other clock movements." The former inferior heading is further subdivided into two subheadings, both of which contain the identical "rewinding" restriction construed in *Belfont*. The government does not dispute that according to *Belfont*, the clock movement provisions subject to this restriction, Items 720.02-720.09, are limited to movements that can be wound and rewound. We agree that under the authority of *Belfont*, the movements of the imported quartz analog clocks are not classifiable under Item

720.02 because they do not involve winding and rewinding as required by that provision.

However, unlike the watch movement provisions at issue in *Belfont*, not all of the clock movement provisions at issue here are subject to a "rewinding" restriction. Certain clock movement provisions of Schedule 7 fall under the heading "Other clock movements." The provisions subsumed under that heading, Items 720.10 through 720.18, are not governed by any limitation that the movements be capable of being wound and rewound. Accordingly, the court properly held that the movements were covered by one of the provisions falling under that heading.

In order for a clock movement to be properly classified under Item 720.14, it must come within the statutory description "Clock movements, assembled * * *: *Other clock movements*: * * * Valued over \$2.25 but not over \$5 each" (emphasis added). Marcel claims that the clock movements are not classifiable under that provision because the heading "Other clock movements" limits the applicability of Item 720.14 to movements greater than or equal to 1.77 inches in width. The government, on the other hand, argues that the heading "Other clock movements" is not limited to clock movements greater than or equal to 1.77 inches in width, but that it includes all clock movements coming within the description of the superior heading which are not covered by any of the provisions of the preceding inferior heading, Items 720.02 through 720.09.

Both parties find support for their interpretations in General Interpretative Rule 10(c) of the TSUS. Rule 10(c) sets out the so-called "rule of relative specificity" which provides that "an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it." The rule is a "judicial aid to the construction of a statute in order to conform with the intent of Congress." *F.L. Smidth & Co. v. United States*, 409 F.2d 1369, 1376, 56 CCPA 77, 86 (1969) (quoting *United States v. Simon Saw & Steel Co.*, 51 CCPA 33 (1964)). Application of the rule, however, is subject to two limiting considerations. First, "a superior heading cannot be enlarged by inferior headings indented under it but can be limited thereby." R. 10(c)(i). Second, "comparisons are to be made only between provisions of coordinate or equal status, i.e., between primary or main superior headings of the schedules or between coordinate inferior headings which are subordinate to the same superior heading." R. 10(c)(ii).

Marcel claims that in determining the scope of the inferior heading "Other clock movements," Rule 10(c)(ii) requires that the heading be compared *only* with its coordinate inferior heading "Measuring less than 1.77 inches in width." Thus, Marcel contends that the heading "Other clock movements" means clock movements other than those measuring less than 1.77 inches in width, i.e., movements measuring 1.77 inches or more in width. Under the interpretation proposed by Marcel, therefore, clock movements measuring less than 1.77 inch in

width but which do not require winding or rewinding, e.g., the movements at issue, are not covered by any of the clock movement provisions of Schedule 7.

Marcel's interpretation must be rejected because it fails to reconcile and give effect to all of the provisions of the rule of relative specificity. Marcel may not choose those rules that afford a favorable interpretation and ignore those that do not. See General Interpretative Rule 10(a), TSUS (1982) (interpretation of TSUS provisions "subject to the rules of interpretation set forth herein").

The interpretative approach proposed by Marcel disregards the clear language of Rule 10(c)(i), which explicitly recognizes that a superior heading can be limited by its inferior headings. See *Nissho-Iwai Am. Corp. v. United States*, 10 CIT 154, 641 F. Supp. 808 (1986); see also U.S. Tariff Comm'n, *Tariff Classification Study: Submitting Report* at 9 (Nov. 15, 1960) (stating that a superior heading can be limited by an inferior heading under the tabular system of the TSUS). Rule 10(c)(i) mandates that the first inferior heading "Measuring less than 1.77 inches in width" be read in conjunction with its two subordinate sub-headings, both of which operate to limit the scope of the first inferior heading to those movements that are capable of being wound and rewound. Only after the first heading is so construed may it be properly compared with its coordinate heading "Other clock movements" pursuant to Rule 10(c)(ii). In accordance with the governing interpretative rules, the heading "Other clock movements" must then be read as covering all clock movements that are described by its superior heading except those movements covered by the provisions of its coordinate heading "Measuring less than 1.77 inches in width." Cf. *Lynteq*, 976 F.2d at 697 (a residual heading covers articles not provided for in an accompanying coordinate *eo nomine* heading). Thus, the clock movements at issue, which measure less than 1.77 inches in width and which are not capable of being wound and rewound, are properly classified under Item 720.14, the most appropriate provision under the heading "Other clock movements."

This interpretation accommodates both aspects of General Rule 10(c), that which suggests limitation of a superior heading by its inferior headings, and that which requires comparison between provisions of coordinate status. The meaning of the first heading "Measuring less than 1.77 inches in width" is determined in part by its inferior headings, and the meaning of its coordinate heading "Other clock movements" is determined by comparing it with the meaning of the first heading. The choice of classifying the clock movements under Item 720.14, among the items enumerated under the heading "Other clock movements," Item 720.10-720.18, follows from the fact that the movements are "[v]alued over \$2.25 but not over \$5 each."

Alternatively, Marcel argues that the legislative history of the TSUS clock movement provisions contained in the *Tariff Classification Study* supports its restrictive reading of the heading "Other clock move-

ments." We, however, do not consider such putative evidence of legislative intent to be persuasive in light of the clear language of the governing interpretative rules and the operative tariff provisions. An arguable indication of congressional intent in the *Tariff Classification Study* alone cannot overcome the clear meaning of the words of the statute. See *American Customs Brokg. Co. v. United States*, 433 F.2d 1340, 1341, 58 CCPA 45, 48 (1972).

Accordingly, we hold that the clock movements of the imported quartz analog clocks, measuring less than 1.77 inches in width and not requiring winding and rewinding, are properly classified under Item 720.14. Consequently, we hold that the imported clocks are properly classified under Item 715.15.

CONCLUSION

Marcel has identified no reversible error committed by the trial court in holding that the imported clocks are classifiable under Item 715.15 and that the clock movements are dutiable under the rate set forth in Item 720.14. We therefore affirm the trial court's grant in part of summary judgment in favor of the government.

AFFIRMED

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10007

Chief Judge
Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson
Herbert N. Maletz
Bernard Newman
Samuel M. Rosenstein

Clerk
Joseph E. Lombardi

Decisions of the United States Court of International Trade

NOTE: This is to advise that Slip Op. 93-229 is not available for publication at this time due to the confidential nature of the document. A public version of the document will be released and published in the CUSTOMS BULLETIN when available.

(Slip Op. 93-229)

_____ v. _____

(Slip Op. 93-230)

SIGMA CORP., U.V. INTERNATIONAL, SOUTHERN STAR, INC., CITY PIPE AND FOUNDRY, INC., AND LONG BEACH IRON WORKS, PLAINTIFFS, AND OVERSEAS TRADE CORP., PLAINTIFF, AND D & L SUPPLY CO., PLAINTIFF, AND DEETER FOUNDRY, INC., ALHAMBRA FOUNDRY, INC., ALLEGHENY FOUNDRY, CO., BINGHAM & TAYLOR DIVISION, VIRGINIA INDUSTRIES INC., CAMPBELL FOUNDRY CO., CHARLOTTE PIPE & FOUNDRY CO., EAST JORDAN IRON WORKS, INC., LEBARON FOUNDRY INC., MUNICIPAL CASTINGS, INC., NEENAH FOUNDRY CO., OPELIKA FOUNDRY CO., INC., PINKERTON FOUNDRY INC., TYLER PIPE INDUSTRIES INC., U.S. FOUNDRY & MANUFACTURING CO. AND VULCAN FOUNDRY, INC., PLAINTIFFS v. UNITED STATES, DEFENDANT, AND D & L SUPPLY CO., DEFENDANT-INTERVENOR, AND DEETER FOUNDRY, INC., ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 91-02-00154

Plaintiffs move pursuant to Rule 56.1 of the Rules of this Court for judgment on the agency record contesting the Department of Commerce, International Trade Administration's ("Commerce") Final Results in *Iron Construction Castings From the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 56 Fed. Reg. 2,742 (1991). Specifically, plaintiffs contest Commerce's (1) use of the Philippines as a surrogate country for determining foreign market value; (2) use of Philippine import statistics as a surrogate for imports used in the People's Republic of China; (3) failure to determine whether the construction castings industry is market oriented; (4) failure to institute reviews for China National Machinery Import and Export Corporation ("MACHIMPEX"), Liaoning, and use of "best information available" for MACHIMPEX Liaoning as a non-responsive company for determining foreign market value; (5) setting of one dumping margin for all Chinese companies and failing to give Guangdong Metals and Minerals Import & Export Corporation ("Guangdong Minmetals") a separate company-specific dumping margin; (6) failure to give Guangdong notice or opportunity for comment on Commerce's change from a separate rate in the Preliminary Results to a

country-wide rate in the Final Results; (7) adjustments for Guangdong Minmetals' constructed value for "after sale" warehousing costs; (8) depreciation estimate as the "best information available"; (9) valuation of different material inputs using different valuation sources; (10) failure to include all costs incurred by Chinese producers to manufacture castings specifically with regard to accounting of (a) special features and bolts, (b) labor costs incurred by Chinese producers, and (c) overhead costs; (11) treatment of foreign inland freight costs incurred in transporting material inputs to the foundries; (12) failure to investigate whether Chinese castings producers were reimbursing U.S. importers of Chinese castings for antidumping duties; and (13) various clerical errors including (a) improperly calculating the amount of aluminum consumed in production, (b) the amount of fireclay consumed, and (c) failing to properly calculate the raw material factors that were valued using petitioners' additives and supply data.

Held: Plaintiffs' motion is granted in part and this case is remanded to Commerce to (1) assess duties against MACHIMPEX Liaoning at the 11.6% deposit rate that it paid upon importation; (2) seek further information from Guangdong Minmetals regarding its independence and if it is satisfied that Guangdong Minmetals is an independent company, Commerce shall set a company-specific rate for Guangdong Minmetals; if not, then Commerce may continue to apply a country-wide rate for Guangdong; (3) recalculate the depreciation expenses using the information supplied by respondents; (4) clarify why it valued other indirect materials in the same manner as it did sand by using U.S. industry data and gather more information if necessary; (5) review or revise its decision regarding direct materials; (6) determine whether all the costs regarding bolts attachments and other special features were accounted for; (7) further investigate whether labor costs were skilled or unskilled; (8) reconsider the information submitted by petitioners regarding overhead costs, or to substantiate on the record why it should not; (9) recalculate freight costs; (10) correct clerical errors involving the amounts of aluminum and fireclay consumed in production; and (11) review Deeter Foundry, Inc.'s allegations regarding the raw material factors. Plaintiffs' motion is denied in all other respects.

[Plaintiffs' motion granted in part and denied in part; case remanded to Commerce.]

(Dated December 8, 1993)

Willkie Farr & Gallagher (Walter J. Spak, Christopher A. Dunn, Theodore C. Whitehouse and Christopher S. Stokes) for plaintiffs Sigma Corporation, U.V. International, Southern Star, Inc., City Pipe and Foundry, Inc. and Long Beach Iron Works.

Mudge Rose Guthrie Alexander & Ferdon (N. David Palmeter, Jeffrey S. Neeley, Martin J. Lewin, Richard G. King and Renee O'Brien) for plaintiff Overseas Trade Corporation.

Whitman & Ransom (Dennis James, Jr. and Kathleen F. Patterson) for plaintiff D & L Supply Co.

Collier, Shannon Rill & Scott (Paul C. Rosenthal, Mary T. Staley and Robin H. Gilbert) for plaintiffs Deeter Foundry, Inc., Alhambra Foundry, Inc., Allegheny Foundry Co., Bingham & Taylor Division, Virginia Industries Inc., Campbell Foundry Co., Charlotte Pipe & Foundry Co., East Jordan Iron Works, Inc., Lebaron Foundry Inc., Municipal Castings, Inc., Neenah Foundry Co., Opelika Foundry Co., Inc., Pinkerton Foundry Inc., Tyler Pipe Industries Inc., U.S. Foundry & Manufacturing Co. and Vulcan Foundry, Inc.

Frank W. Hunger, Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Velta A. Melnbrensis and Paul Herrup); of counsel: *Jeffery C. Lowe and Robert J. Heilferty, Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce,* for defendant.

Whitman & Ransom (Dennis James, Jr. and Kathleen F. Patterson) for defendant-intervenor D & L Supply Co.

Collier, Shannon Rill & Scott (Paul C. Rosenthal, Mary T. Staley and Robin H. Gilbert) for defendant-intervenor Deeter Foundry, Inc., Alhambra Foundry, Inc., Allegheny Foundry Co., Bingham & Taylor Division, Virginia Industries Inc., Campbell Foundry Co., Charlotte Pipe & Foundry Co., East Jordan Iron Works, Inc., Lebaron Foundry Inc., Municipal Castings, Inc., Neenah Foundry Co., Opelika Foundry Co., Inc., Pinkerton Foundry Inc., Tyler Pipe Industries Inc., U.S. Foundry & Manufacturing Co. and Vulcan Foundry, Inc.

OPINION

TSOUCALAS, *Judge*: Plaintiffs, Sigma Corporation, *et al.*, move pursuant to Rule 56.1 of the Rules of this Court for judgment on the agency record contesting the Department of Commerce, International Trade Administration's ("Commerce") Final Results in *Iron Construction Castings From the People's Republic of China; Final Results of Antidumping Duty Administrative Review ("Final Results")*, 56 Fed. Reg. 2,742 (1991).

On May 13, 1985, the Municipal Castings Fair Trade Council ("MCFTC") and fifteen individual United States companies filed a petition with Commerce alleging that imports of iron construction castings were being sold at less than fair value in the United States. *Certain Iron Construction Castings From the People's Republic of China; Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 9,483 (1986). In response to this petition, Commerce conducted an antidumping investigation which resulted in the issuance of an antidumping duty order on iron construction castings from the People's Republic of China. *Antidumping Duty Order; Iron Construction Castings From the People's Republic of China (the PRC)*, 51 Fed. Reg. 17,222 (1986).

On June 29, 1988, Commerce issued a notice of initiation of an administrative review for the period May 1, 1987 through April 30, 1988. *Initiation of Antidumping and Countervailing Duty Administrative Reviews ("1987-88 Initiation")*, 53 Fed. Reg. 24,470 (1988). On June 21, 1989, Commerce likewise issued a notice for the period from May 1, 1988 through April 30, 1989. *Initiation of Antidumping and Countervailing Duty Administrative Reviews ("1988-89 Initiation")*, 54 Fed. Reg. 26,069 (1989). Commerce subsequently consolidated these two reviews and issued its preliminary results on June 5, 1990. *Iron Construction Castings From the People's Republic of China; Preliminary Results of Antidumping Duty Administrative Review ("Preliminary Results")*, 55 Fed. Reg. 22,939 (1990). The Final Results were issued on January 24, 1991. *Final Results*, 56 Fed. Reg. at 2,742. Oral Argument was heard in this case on July 20, 1993.

The administrative review at issue in this case covers the periods from May 1, 1987 through April 30, 1988 and May 1, 1988 through April 30, 1989. *Id.* Specifically, plaintiffs contest Commerce's (1) use of the Philippines as a surrogate country for determining foreign market value; (2) use of Philippine import statistics as a surrogate for imports used in the People's Republic of China; (3) failure to determine whether the construction castings industry is market-oriented; (4) failure to institute reviews for China National Machinery Import and Export Corporation, Liaoning ("MACHIMPEX Liaoning"), and use of "best information available" for MACHIMPEX Liaoning as a non-responsive company for determining foreign market value; (5) setting of one dumping margin for all Chinese companies and failing to give Guangdong Metals and Minerals Import & Export Corporation ("Guangdong Minmetals") a separate company-specific dumping margin; (6) failure

to give Guangdong notice or opportunity for comment on Commerce's change from a separate rate in the Preliminary Results to a country-wide rate in the Final Results; (7) adjustments for Guangdong's constructed value for "after sale" warehousing costs; (8) depreciation estimate as the "best information available"; (9) valuation of different material inputs using different valuation sources; (10) failure to include all costs incurred by Chinese producers to manufacture castings specifically with regard to accounting of (a) special features and bolts, (b) labor costs incurred by Chinese producers, and (c) overhead costs; (11) treatment of foreign inland freight costs incurred in transporting material inputs to the foundries; (12) failure to investigate whether Chinese castings producers were reimbursing U.S. importers of Chinese castings for antidumping duties; and (13) various clerical errors including (a) improperly calculating the amount of aluminum consumed in production, (b) the amount of fireclay consumed, and (c) failing to properly calculate the raw material factors that were valued using petitioners' additives and supply data.

DISCUSSION

In reviewing a final determination of Commerce, this Court must uphold that determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence has been defined as being "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).

1. *Use of Philippines as Surrogate Country:*

Plaintiffs, Sigma Corporation, U.V. International, Southern Star, Inc., City Pipe and Foundry, Inc. and Long Beach Iron Works ("Sigma"), claim that Commerce's use of the Philippines as the surrogate country for a non-market economy was unsupported by substantial evidence on the record and not in accordance with law. *Sigma's Memorandum of Points and Authorities in Support of Plaintiffs' Rule 56.1 Motion for Judgment on the Agency Record* ("Sigma's Memorandum") at 5.

Defendant claims that the decision to employ the Philippines as a surrogate country was properly made based on the criteria outlined in the statute and the failure of the parties to provide information establishing that the Philippines was not an appropriate surrogate. *Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment Upon the Administrative Record* ("Defendant's Memorandum") at 47-48.

According to 19 U.S.C. § 1677b(c)(2) (1988 & Supp. 1993):

If the administering authority finds that the available information is inadequate for purposes of determining the foreign market value of merchandise * * * the administering authority shall determine the foreign market value on the basis of the price at which merchandise that is—

(A) comparable to the merchandise under investigation, and

(B) produced in one or more market economy countries that are at a level of economic development comparable to that of the non-market economy country, [whose merchandise]

is sold in other countries, including the United States.¹

Thus, in this case the Philippines was chosen as the appropriate surrogate country. Plaintiffs claim that there is no evidence on the record indicating that the Philippines is an appropriate surrogate country and, furthermore, that Commerce did not fully investigate other potential surrogates. *Sigma's Memorandum* at 5-6. Contrary to plaintiffs' contentions, however, Commerce attempted to identify producers and/or exporters of iron construction castings in several countries including India, Indonesia, Pakistan, the Philippines, Sri Lanka, Bolivia, Jamaica, Morocco, Zambia, and Zimbabwe, countries which were considered comparable to the People's Republic of China in stage of economic development. See *Preliminary Results*, 55 Fed. Reg. at 22,940; see also Administrative Record ("AR") (Pub.) Docs. 15, 39, 40, 44, 45, 46. Commerce tried to obtain information from all these potential surrogates, but Commerce received no responses to these requests for information. See *Preliminary Results*, 55 Fed. Reg. at 22,940; see also AR (Pub.) Docs. 15, 39, 40, 44, 45, 46. Thus, Commerce relied on the Philippines because it was a country at a comparable level of development to China for which Commerce located adequate information. *Preliminary Results*, 55 Fed. Reg. at 22,940.

This Court has previously stated that Commerce is not required to use the surrogate with the most comparable economy; it is only required to use a surrogate with a comparable economy. See *Tehnoimportexport and Peer Bearing Co. v. United States*, 15 CIT 250, 256, 766 F. Supp. 1169, 1175 (1991). The Court "will not impose its choice of which economy is more comparable * * * provided the choice made by Commerce is sufficiently reasonable and supported by the evidence." *Id.* at 255, 766 F. Supp. at 1175.

The Philippines has been used as a surrogate for the People's Republic of China in the past. See, e.g., *Preliminary Determination of Sales at Less Than Fair Value; Certain Headwear From the People's Republic of China*, 53 Fed. Reg. 45,138, 45,141 (1988). Moreover, plaintiffs have not

¹ 19 C.F.R. § 353.8(b)(1) (1988) states:

Comparability of economic development shall be determined from generally recognized criteria, including per capita gross national product and infrastructure development (particularly in the industry producing such or similar merchandise).

set forth any concrete evidence why the Philippines should not be selected as a surrogate country in this case.

Plaintiffs also claim that Commerce did not provide notice or opportunity for them to comment on the selection of the Philippines as a surrogate country until after the preliminary determination. *Sigma's Memorandum* at 6. In support of their claim, Sigma cites a letter issued by Commerce in another investigation. See *Sigma's Memorandum*, Appendix 1, *Antidumping Duty Investigation of Certain Compact Ductile Iron Waterworks (CDIW) Fittings and Accessories Thereof from the People's Republic of China* ("Waterworks Fittings"). The letter stated: "[W]e are providing you with the opportunity to submit any publicly available published information] which you feel the Department should consider using to value factors of production in this investigation." *Id.* This letter, however, did not specifically request comment on the choice of surrogate country as plaintiffs allude.

Nevertheless, in this case, prior to the issuance of the preliminary results, Commerce similarly solicited comments from interested parties on the method for valuing factors of production. Therefore, Sigma is mistaken by insinuating that Commerce provided disparate treatment to parties in *Waterworks Fittings* and the case at hand.

Thus, since Commerce's selection was reasonable, this Court deems that Commerce properly selected the Philippines as a surrogate country and, therefore, Commerce's selection is hereby affirmed.

2. Import Statistics:

Sigma also contests Commerce's use of Philippine import statistics as a surrogate for the particular imports used in the People's Republic of China claiming that it distorted the calculation of foreign market value. *Sigma's Memorandum* at 8. Sigma claims that using import statistics do not reflect the market forces in the construction castings industry in the People's Republic of China because the import categories include materials that are used in the construction castings industry. *Id.* at 8-10.

In the Final Results, Commerce determined that it valued certain of "the Chinese factors of production using publicly available statistical sources." *Final Results*, 56 Fed. Reg. at 2,743. Commerce has had difficulty acquiring such data on other occasions and in those instances the Court has affirmed Commerce's use of import statistics. See *Tehnoimportexport*, 15 CIT at 255-56, 766 F. Supp. at 1176; see also *Tehnoimportexport*, *UCF America Inc. v. United States*, 16 CIT ___, 783 F. Supp. 1401 (1992). Furthermore, "[t]here is no statutory or case law stating that import [statistics] cannot be used." *Tehnoimportexport*, 16 CIT at ___, 783 F. Supp. at 1405.

In this case, Commerce rejected Sigma's claim stating in the Final Results that it was

satisfied that the official import statistics of the Philippines are reasonable measures of the factor values in the PRC. We were able to accurately identify imports of virtually every material used to produce iron construction castings during each period covered by

these administrative reviews. These statistics represent the official trade statistics of the Philippine government. The commodity classification system follows the Standard International Trade Classification of the United Nations, a well-respected and widely-used product classification system.

With respect to the price fluctuations within each category, we note that the import prices we used are weighted-average figures calculated on an annual basis. This averaging of import prices reduces the effects of any price fluctuations which may occur.

Final Results, 56 Fed. Reg. at 2,745.

Thus, Commerce's selection of import statistics was clearly substantiated on the record and its decision was more than reasonable. Therefore, its determination as to this issue is affirmed.

3. Market-Oriented Industry:

Sigma also claims that Commerce failed to determine whether the construction castings industry in the People's Republic of China is market-oriented and, furthermore, that this case should be remanded to Commerce so that it can determine whether the construction castings industry in the People's Republic of China is market-oriented. *Sigma's Memorandum* at 10-12.

Defendant and defendant-intervenors, Deeter Foundry, *et al.*, claim that Sigma failed to exhaust its administrative remedies regarding this issue and, therefore, cannot bring this issue up now. *Defendant's Memorandum* at 46; *Defendants-Intervenors' [Deeter Foundry, et al.] Response in Opposition to Sigma's Motion and Guangdong Minmetals' Motion for Judgment Upon the Agency Record* at 21-24. The court has stated that "[a] litigant may not raise an issue for the first time on appeal." See *Cemex S.A. v. United States*, 16 CIT ___, ___, 790 F. Supp. 290, 296 (1992); see also *Wieland Werke, AG v. United States*, 13 CIT 561, 567, 718 F. Supp. 50, 55 (1989). The court "usurps the agency's function when it sets aside a determination upon a ground not previously presented and deprives the agency of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Wieland Werke*, 13 CIT at 567, 718 F. Supp. at 55; *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

In the underlying proceeding, Sigma never contended that the castings industry was market-oriented and, therefore, Commerce did not have the opportunity to consider the merits of this claim or seek any factual information.

The court has recognized several exceptions to the exhaustion requirement. For example, if a party does not have access to the confidential record or it would be futile to raise an argument at the administrative level, then a plaintiff is not required to exhaust its administrative remedies. See *Budd Co. Wheel & Brake Div. v. United States*, 15 CIT 446, 452-53, 773 F. Supp. 1549, 1554-55 (1991); see also *Rhone Poulenc, S.A. v. United States*, 7 CIT 133, 583 F. Supp. 607 (1984). In this case, however, plaintiffs do not even address the issue of

exhausting administrative remedies and its exceptions, nor do any of the exceptions apply. *Sigma's Memorandum* at 10; *Reply of Plaintiffs Sigma Corporation, et al., to Oppositions to Motion for Judgment on the Agency Record* at 1-3. Thus, the Court is not in a position to entertain plaintiffs' arguments at this time as plaintiffs have failed to exhaust their administrative remedies on this issue and, therefore, this Court denies Sigma's motion to remand this case to Commerce so that it can determine whether the construction castings industry in the People's Republic of China is market-oriented.

4. *Exclusion of Liaoning:*

Plaintiff Overseas Trade Corporation ("Overseas") is an American owned company located in Seattle, Washington. During the periods of review in question in this case, Overseas purchased iron construction castings from one Chinese company, China National Machinery Import and Export Corporation ("MACHIMPEX"), Liaoning. overseas claims that Commerce's failure to name MACHIMPEX Liaoning in its requests for reviews and its failure to institute reviews for that company was unsupported by substantial evidence. *Plaintiff Overseas Trade Corporation's Brief in Support of its Motion for Judgment Upon the Agency Record ("Overseas Brief")* at 12-13.

Overseas claims that during the periods of review, MACHIMPEX Liaoning was a separate and distinct company from other companies bearing the MACHIMPEX name. Indeed, at one time, Liaoning was connected with the national headquarters in Beijing, but Overseas contends that this is no longer the case.

On May 26, 1988, counsel for the MCFTC requested Commerce to institute an administrative review of certain companies for the 1987-88 review period. AR (Pub.) Doc. 2. In its subsequent notice of initiation of antidumping and countervailing duty administrative reviews, Commerce named the companies it was reviewing including MACHIMPEX and Minmetals Beijing. *1987-88 Initiation*, 53 Fed. Reg. 24,471. On July 26, 1988, Commerce directed the sending of questionnaires to several firms including MACHIMPEX, Beijing. AR (Pub.) Doc. 10. No such questionnaire was sent to MACHIMPEX, Liaoning.

On October 4, 1988, counsel for MCFTC filed a letter with Commerce to clarify the exact companies that were to be reviewed. AR (Pub.) Doc. 29. The letter specifically requested clarification regarding Minmetals and not MACHIMPEX. The letter objected to Commerce's serving questionnaires only upon the Beijing and Guangdong branches of Minmetals and not on any of the other Minmetals companies. The letter stated that the request for review "was not limited to any particular branch of Minmetals, but identified the whole corporate entity." This request was based on the understanding that five branches of Minmetals were engaged in the export of the subject merchandise to the United States. *Id.* at 2. No such clarification was requested or made regarding MACHIMPEX.

On May 31, 1989, the MCFTC similarly requested an administrative review for the 1988-89 review of eight specific companies including the Beijing branch of Minmetals, the Guangdong branch of Minmetals, the Liaoning branch of Minmetals, the Jilin branch of Minmetals, the Anhui branch of Minmetals, and MACHIMPEX. MACHIMPEX Liaoning was not specifically mentioned. AR (Pub.) Doc. 59. On June 21, 1989, Commerce subsequently published its notice of initiation of the antidumping and countervailing duty administrative review in the Federal Register listing each of the above companies, but not MACHIMPEX Liaoning. 1988-89 Initiation, 54 Fed. Reg. at 26,069. On June 26, 1989, Commerce sent a questionnaire to MACHIMPEX, but none was sent to MACHIMPEX Liaoning.

On June 5, 1990, Commerce published its Preliminary Results for both review periods for iron construction castings from the People's Republic of China. *Preliminary Results*, 55 Fed. Reg. 22,939. Commerce calculated a dumping margin of 47.54% for the 1987-88 period and 97.57% for the 1988-89 period based on "best information available" and stated that it applied to "all unnamed branches of those corporations." *Id.*

Plaintiff Overseas now claims that MACHIMPEX Liaoning cannot be subject to these rates since it was a separate company from MACHIMPEX. Overseas claims that Liaoning was not identified as a respondent by petitioner, did not have reviews instituted against it and did not receive a questionnaire. Overseas now claims that since it had no idea that it was subject to the review that its duties should be assessed at the 11.6% deposit rate that it paid upon importation. *Overseas Brief* at 7.

Defendant claims, however, that notification of the review and servicing of questionnaires was sent to MACHIMPEX headquarters in Beijing and that MACHIMPEX and all its branches had been subject to antidumping procedures since 1985 and they should have been familiar with Commerce's procedures. *Defendant's Memorandum* at 34. Furthermore, Commerce claims that no one notified Commerce that Liaoning was separate.

In determining whether substantial evidence supports Commerce's determination that plaintiffs were not independent from the national headquarters, the exporter must affirmatively demonstrate "an absence of central government control, both in law and in fact, with respect to exports." *Final Determinations of Sales at Less Than Fair Value: Sparklers From the People's Republic of China* ("Sparklers From PRC"), 56 Fed. Reg. 20,588, 20,589 (1991).

Evidence supporting *de jure* absence of central control includes: (1) absence of restrictive stipulations on individual exporter's business and export licenses; (2) legislative enactments decentralizing control of companies; or (3) formal measures by the government decentralizing control of the companies. *Tianjin Machinery Import & Export Corp. v. United States*, 16 CIT ___, ___, 806 F. Supp. 1008, 1014 (1992). *De facto* absence of central government control should meet two

prerequisites: (1) each exporter sets its own export prices independently of the government and other exporters; and (2) each exporter keeps the proceeds from its sales. *Id.*

In the present case, Overseas and Liaoning relied on two documents to support its claim that the Liaoning branch of MACHIMPEX is an independent entity. The first is a letter from Overseas which states that "each branch of China National Machinery is an independent company. Each branch has its own customers and independently sets its prices." *Defendants-Intervenors' (Deeter Foundry, et al.) Response in Opposition to Overseas Trade Corporation's Motion for Judgment Upon the Agency Record ("Defendant-Intervenors' Response")* at 14. The second piece of evidence submitted by Overseas is an October 11, 1990 letter from the Chinese Ministry of Foreign Economic Relations and Trade to Secretary Mosbacher which is not a part of the administrative record. *See id.* at 15.

Regardless of the propriety of reliance on this letter, the October 11 letter provides no specific information but instead states that all Chinese local trading companies were separated from the national trading companies. *Id.* In view of the extent of information submitted, it does not appear that MACHIMPEX Liaoning has met its burden of proof to establish their independence from MACHIMPEX. However, Liaoning was never afforded adequate opportunity to establish its independence.

In *Tianjin Machinery*, the court similarly ruled that plaintiffs were not independent legal entities on the grounds that they failed to prove their independence. *Tianjin Machinery*, 16 CIT at ___, 806 F. Supp. at 1014-15. In *Tianjin Machinery*, however, plaintiffs were aware that they were subject to the review, and they were served with questionnaires that were completed. In the case at hand, Liaoning was not afforded with this opportunity.

Best Information Available:

To add insult to injury, Commerce applied the "best information available" rule to Liaoning as an unresponsive company to calculate a dumping margin. *Overseas Brief* at 20-22. Overseas claims that Commerce's application was unsupported by substantial evidence since no review was requested of Liaoning and no questionnaire was served on that company. *Id.*

According to 19 U.S.C. § 1677e(c) (1988 & Supp. 1993):

Determinations to be made on best information available

In making their determinations under this subtitle, the administering authority and the Commission shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

Thus, the statute states that Commerce is authorized to use best information available when a party is unable or does not provide Commerce with the necessary information with which to make its determination. *Id.* In this case, Liaoning never refused and was never

unable to supply the information. They did not respond since they were not given adequate opportunity because they simply did not know.

Furthermore, the MCFTC's request was not clear and understandable from the record. This court has held that there is "a burden on the party making the request to submit a clear, understandable and comprehensive request within the deadline set by the regulation." *Floral Trade Council v. United States*, 13 CIT 142, 144, 707 F. Supp. 1343, 1344-45, *aff'd*, 888 F.2d 1366 (Fed. Cir. 1989). It is clear to the Court in this case that the request was not clear, understandable and comprehensive. The request clearly did not list MACHIMPEX Liaoning. It merely listed MACHIMPEX and not any of its branches. It did, however, list several branches of Minmetals which gives rise to the presumption that if Liaoning was to be included it would have been separately listed. Furthermore, the clarification letter sent by the MCFTC to Commerce on October 4, 1988 specifically requested clarification as to whether Minmetals branches were subject to the review but no such clarification was requested regarding MACHIMPEX which leads this Court to believe that the request did not include MACHIMPEX Liaoning. AR (Pub.) Doc. 29.

Granted, Commerce is not required to search out all subsidiaries of every company it reviews, but under the circumstances of this case, the Court cannot in all fairness deem MACHIMPEX Liaoning as within the scope of this review. Parties have an obligation to be precise in their requests thereby affording companies adequate notice to defend their interests. In this case, adequate notice was not given and, therefore, Overseas' motion for judgment on the agency record regarding this issue is granted and its duties are to be assessed at the 11.6% deposit rate that it paid upon importation.

5. *Company-Specific Rate v. Country-Wide Rate:*

Plaintiff D & L Supply Co. ("D & L"), an importer of castings produced by Guangdong Metals and Minerals Import and Export Corporation ("Guangdong Minmetals"), claims that Commerce erred in refusing to give Guangdong Minmetals a separate company-specific antidumping margin.² *Plaintiff D & L Supply Co.'s Memorandum of Points and Authorities in Support of its Rule 56.1 Motion for Judgment on the Agency Record* ("D & L Memorandum") at 12. D & L further claims that Commerce's determination of a country-wide antidumping margin for every Chinese iron construction castings exporter was issued without a reasonable explanation and was contrary to existing precedent. *Id.* at 12-18. Plaintiff D & L claims that if Guangdong Minmetals qualified for a separate rate during the subsequent 1989-90 review period, then it also should have qualified for separate rates during the two previous years. *Id.* 18-20.

² Plaintiff Overseas Trade Corporation ("Overseas") also raises this issue with regard to MACHIMPEX Liaoning. However, as to Overseas, this issue is now moot since the Court has ruled in the preceding section of this opinion that this case is remanded to Commerce to assess duties against MACHIMPEX Liaoning at the 11.6% deposit rate that it paid upon importation.

On July 27, 1988, Commerce issued questionnaires to respondents including Guangdong Minmetals. In its questionnaire responses, Guangdong Minmetals provided information pertaining to its change in status from a branch of the China National Metals and Minerals Import and Export Corporation to an independent company. *Preliminary Results*, 55 Fed. Reg. at 22,940; AR (Pub.) Doc. 21 at 171. The separation from the main corporation allegedly took place in 1987, after the original antidumping investigation. AR (Pub.) Doc. 84. To substantiate its claim of independence, Guangdong Minmetals provided Commerce with business licenses, business cards, and letterhead. *Id.* Subsequently, Commerce issued its preliminary determination stating the following:

In the course of the 1987-1988 review, both Minmet Beijing and Guangdong Minmetals claimed that they had changed in status from a branch of the China National Metals and Minerals Import and Export Corporation to a separate corporate entity since the original antidumping investigation. This claim was reiterated during the 1988-1989 review. Therefore, we sent questionnaires to each separately named branch and the headquarters of every import/export corporation of which we were aware. We analyzed the responses and calculated separate margins for each response that we received.

Preliminary Results, 55 Fed. Reg. at 22,940.

In fact, the Preliminary Results concluded by reiterating that Commerce was "calculating separate margins for each branch of each import/export corporation and its suppliers for the purposes of these reviews." *Id.*

Relying on Commerce's statements in the Preliminary Results, petitioners did not question Guangdong Minmetals' qualification for a separate rate in their briefs or during the hearing held on August 16, 1990. In fact, for the most part, petitioners concurred with Commerce on the Preliminary Results by stating in its prehearing brief:

The general methodology used by the Department to calculate the foreign market value of constructed castings from the People's Republic of China was appropriate. As the foregoing discussion makes clear, however, certain technical corrections should be made to the Department's calculations for purposes of its final determination.

AR (Pub.) Doc. 160 at 15-16.

At the hearing, petitioners again expressed their general agreement with Commerce's approach. AR (Pub.) Doc. 164 at 35. When Commerce thereafter brought up the relationship between the responding companies, it addressed these points as "minor points." *Id.* at 75-77.

Thus, based on Commerce's Preliminary Results and its behavior at the hearing, petitioners relied on these actions and assumed that Commerce would continue its approach by setting separate margins for the Final Results.

In its Final Results, however, Commerce reversed its decision and subjected every Chinese exporter to a single country-wide rate. Commerce stated:

In reevaluating our preliminary decision to apply separate margins to individual branches, we have examined the record to determine whether we have information which indicates that the national import/export corporations are independent from one another. We have found no such information. The respondents stated in their questionnaire responses that they were state-owned entities. Our determination that the PRC is a state-controlled economy in which all entities are presumed to export under the control of the state leads us to question the application of multiple rates, absent a clear showing of legal, financial and economic independence. Thus, we conclude that a single country-wide rate is appropriate for this case. We have determined one weighted-average margin for each review period for all exports from the PRC of iron construction castings.

Final Results, 56 Fed. Reg. at 2,744.

Plaintiff D & L now claims that Commerce failed to give D & L or Guangdong Minmetals any notice that the rates would abruptly go from company-specific to country-wide. *D & L Memorandum* at 10. Furthermore, D & L claims that Commerce failed to request any further information and that this drastic change was detrimental to D & L as Guangdong Minmetals' individual dumping margins were determined to be considerably lower than the weighted-average margin for all Chinese castings exporters. *Id.* In support of their arguments D & L notes that in the next administrative review covering the period from May 1, 1989 through April 30, 1990 ("1989-90 Review") Commerce reversed its position again and found that Guangdong Minmetals qualified for a separate antidumping margin. See *Final Results of Antidumping Duty Administrative Review: Certain Iron Construction Castings From the People's Republic of China ("Iron Construction Castings")*, 57 Fed. Reg. 10,644, 10,647 (1992); see also *D & L Memorandum* at 18-19.

Relying on *USX Corp. v. United States*, 11 CIT 82, 655 F. Supp. 487 (1987), D & L claims that Commerce has to give a reasonable explanation for imposing country-wide margins in the final determination when it stated that it would impose company-specific margins in its preliminary determination. *D & L Memorandum* at 13 (citing *USX*, 11 CIT at 84-85, 655 F. Supp. at 490); *SCM Corp. v. United States*, 2 CIT 1, 3, 519 F. Supp. 911, 913 (1981).

Defendant claims that Guangdong failed to show a clear record of legal, financial and economic independence, while plaintiff in essence claims that they were misled in relying upon Commerce's actions. Commerce explained its rationale for applying a single country-wide dumping margin to all branch companies by stating:

In each of the examples cited above, the exporter is identified on the invoices as either the provincial or municipal (city) branch of a national import/export corporation. * * * Our determination that the

PRC is a state-controlled economy in which all entities are presumed to export under the control of the state leads us to question the application of multiple rates, absent a clear showing of legal, financial and economic independence.

Final Results, 56 Fed. Reg. at 2,744.

After Commerce notifies the national headquarters of the review, the national corporation should notify all of the branch companies and it is then the burden of the branch company to demonstrate that it is a separate entity. *Tianjin Machinery*, 16 CIT at ____, 806 F. Supp. at 1015. Plaintiffs must "meet their preliminary burden of creating an adequate record supporting a claim of independence." *Id.* at ____, 806 F. Supp. at 1015.

In determining whether substantial evidence supports Commerce's determination that plaintiffs were not independent from the national headquarters, the exporter must affirmatively demonstrate "an absence of central government control, both in law and in fact, with respect to exports." *Sparklers From PRC*, 56 Fed. Reg. at 20,589.

Commerce further claims that companies in non-market economy ("NME") countries are presumed to be part of a state-controlled operation. *Defendant's Memorandum* at 24. This presumption can be rebutted by the company proving its independence. Thus, in the context of a dumping determination, the burden of proof lies with the respondents and not Commerce. *Chinsung Indus. Co. v. United States*, 13 CIT 103, 106-07, 705 F. Supp. 598, 601 (1989). Exporters in a NME country are entitled to separate, company-specific margins by affirmatively meeting the *Sparklers From PRC* criteria which were discussed in detail in the preceding section of this opinion.³ See *Tianjin Machinery*, 16 CIT at ____, 806 F. Supp. at 1013-14 (quoting *Sparklers From PRC*, 56 Fed. Reg. at 20,589).

Once an exporter has submitted information to establish its independence from the state, it then becomes Commerce's duty to verify the information submitted by the respondent. *Tianjin Machinery*, 16 CIT at ____, 806 F. Supp. at 1015. This does not mean, however, that Commerce is required to seek out new information where the respondents have failed to meet their burden of creating "an adequate record supporting a claim of independence." *Id.* at ____, 806 F. Supp. at 1015.

In *Sparklers From PRC*, upon verification of documents respondents had submitted in that case, Commerce assigned separate, company-specific margins. During verification, Commerce found that each exporter set its own prices for exports and deposited its sales proceeds into a sepa-

³ In determining whether substantial evidence supports Commerce's determination that plaintiffs were not independent from the national headquarters, the exporter must affirmatively demonstrate "an absence of central government control, both in law and in fact, with respect to exports." *Final Determinations of Sales at Less Than Fair Value: Sparklers From the People's Republic of China ("Sparklers From PRC")*, 56 Fed. Reg. 20,586, 20,589 (1991).

Evidence supporting *de jure* absence of central control includes: (1) absence of restrictive stipulations on individual exporter's business and export licenses; (2) legislative enactments decentralizing control of companies; or (3) formal measures by the government decentralizing control of the companies. *Tianjin Machinery Import & Export Corp. v. United States*, 16 CIT ____, 806 F. Supp. 1008, 1014 (1992). *De facto* absence of central government control should meet two prerequisites: (1) each exporter sets its own export prices independently of the government and other exporters; and (2) each exporter keeps the proceeds from its sales. *Id.*

rate bank account. Furthermore, respondents had submitted their business licenses along with published explanations on the ramifications of receiving a business license. Commerce found that these explanations did not mention any stipulations that could be construed as specific central control of pricing or production. *Id.* at ___, 806 F. Supp. at 1014-15. Also, these explanations were published before the investigation had even begun.

The respondents in the *Tianjin Machinery* investigation had not submitted objective evidence to show absence of central control. *Id.* at ___, 806 F. Supp. at 1014. The court showed its emphasis by noting that in the case before it, the only pre-Petition document located by the court was an order stating what the company's new name would be after independence and that it should start immediate proceedings for legal registration of its new name. *Id.* at ___, 806 F. Supp. at 1014-15 n.4. In evaluating the order, the court stated that the order did not establish the company's formal registration of its new title or use of that title exclusive of any other name. *Id.* at ___, 806 F. Supp. at 1015. Thus, the order by itself did not establish that the company had in fact become independent.

In the *Final Results* in this case, Commerce stated, "[b]ased on our analysis of the comments received, the final results are changed from those presented in the preliminary results." *Final Results*, 56 Fed. Reg. at 2,744.

Commerce's primary reason for changing from company-specific to country-wide margins was Guangdong Minmetals' failure to meet its burden of showing "legal, financial and economic independence."

In Guangdong Minmetals' case, it submitted business licenses issued in 1988 and 1989, letterhead and business cards identifying it as Guangdong Metals and Minerals Import and Export Corporation. Commerce stated that this license showed Guangdong Minmetals to be a state-owned corporation. *Final Results*, 56 Fed. Reg. at 2,743. Commerce also relied on U.S. Customs Service records of entries identifying Guangdong Minmetals as the Guangdong (Province) Branch of the China National Metals and Minerals Import and Export Corporation. Thus, Commerce identified Guangdong Minmetals as a branch of a national import/export corporation. *Id.* at 2,744.

In rebuttal, plaintiff points to the fact that in subsequent cases Commerce found Guangdong Minmetals to be a separate entity and assigned it a company-specific rate.

In the *Iron Construction Castings* determination, 57 Fed. Reg. at 10,644, Commerce granted respondents separate, company-specific margins in its preliminary determination. *Preliminary Results of Antidumping Duty Administrative Review: Certain Iron Construction Castings From the People's Republic of China*, 57 Fed. Reg. 37,074, 37,074-075 (1991). Commerce did not change its determination regarding this issue in its final results. *Iron Construction Castings*, 57 Fed. Reg. at 10,644. Commerce differentiates that determination from the

one at hand by the amount of evidence submitted. In that case, bank records and other material proof were supplied. In this case, however, the material proof was never requested. If you do not ask for it, you cannot expect to get it.

The burden of proof to show that a company is independent is on the respondent, but if it has not supplied enough information, the burden shifts to Commerce to ask for more information. Furthermore, it goes against all fairness for Commerce to say one thing in the preliminary results and then to have plaintiffs rely on this fact and not argue its case any further. Then, when plaintiffs cannot argue any further, Commerce changes its position and issues a final determination saying the complete opposite.

If Commerce felt that it should issue country-wide rates after it published the preliminary results, then Commerce should have issued an amended preliminary determination or provided respondents with supplemental questionnaires requesting additional proof regarding their independence. Instead, Commerce simply changed its position without giving notice to the respondents. Commerce cannot expect a respondent to be a mind-reader. Therefore, this case is remanded so that Commerce may seek further information from Guangdong Minmetals regarding its independence during the period involved and if it is satisfied that Guangdong Minmetals is an independent company, then Commerce shall set a company-specific rate for Guangdong Minmetals. If Commerce is not satisfied, then Commerce may continue to apply a country-wide rate for Guangdong Minmetals.

6. *Guangdong Minmetals' Notice or Opportunity to Comment:*

Plaintiff D & L also claims that Commerce's failure to afford Guangdong Minmetals notice or opportunity for comment on Commerce's change from a company-specific rate to a country-wide rate between the preliminary and the final results is a violation of due process. *D & L Memorandum* at 20. D & L states that since the Preliminary Results failed to mention that Commerce was contemplating a country-wide rate for all Chinese exporters of iron construction castings then D & L could not address this point in its brief. *Id.* at 20-21.

Commerce claims that it is not required, in order to reexamine a provisional conclusion contained in a preliminary result of an administrative review, to repeat notice and comment procedures already satisfied in the earlier phases of review. *Defendant's Memorandum* at 39.

It is well established that when considering a procedural due process issue, "the court must first determine whether a protected property or liberty interest exists, and if such an interest exists, then determine what procedures are necessary to protect that interest." *Technabexport, Ltd. v. United States*, 16 CIT ___, ___, 795 F. Supp. 428, 435 (1992); *American Ass'n of Exporters and Importers v. United States*, 751 F.2d 1239, 1250 (Fed. Cir. 1985); *Comm. to Preserve Am. Color Television and Imports Comm., Tube Div., Elec. Indus. Ass'n v. United States*, 2 CIT 208, 218, 527 F. Supp. 341, 350 (1981).

Furthermore, "for an interest to be protected by the Constitution, it must be 'some interest worthy of protecting.'" *Techsnabexport*, 16 CIT at ___, 795 F. Supp. at 435 (quoting *American Ass'n of Exporters and Importers*, 751 F.2d at 1250). In order to be protected, an interest must be "more than a 'unilateral expectation.'" *PPG Indus., Inc. v. United States*, 13 CIT 183, 189, 708 F. Supp. 1327, 1331 (1989) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). Moreover, it is "well settled that procedural due process guarantees do not require full-blown, trial type proceedings in all administrative determinations." *PPG Indus.*, 13 CIT at 189, 708 Supp. at 1332; *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). Ultimately, however, "in calculating the constitutional sufficiency of notice, the court must examine all of the circumstances and make a determination based upon the reasonableness of the notice and participation." *Techsnabexport*, 16 CIT at ___, 795 F. Supp. at 436.

In *Lois Jeans & Jackets, U.S.A., Inc. v. United States*, 5 CIT 238, 566 F. Supp. 1523 (1983), the court also added that prejudice to the party should be strongly considered in determining whether due process rights are violated. In *Lois Jeans & Jackets*, the court stated that "the procedural irregularities complained of by Lois — viz., lack of notice and opportunity to comment — are so fundamentally prejudicial as to constitute a deprivation of due process." *Id.* at 243, 566 F. Supp. at 1528.

In the case at hand, under the circumstances, this Court agrees that plaintiffs were likewise denied notice and opportunity to comment which constituted fundamental prejudice to them. Therefore, as previously mentioned, this case is remanded to Commerce so that Commerce may seek further information from Guangdong Minmetals regarding its independence, and if it is satisfied that Guangdong Minmetals is an independent company, then Commerce shall set a company-specific rate for Guangdong Minmetals.

7. Guangdong Minmetals' Warehousing Costs:

Plaintiff D & L also claims that Commerce's adjustment to Guangdong Minmetals' constructed value for "after-sale" warehousing costs was inappropriate. *D & L Memorandum* at 27.

In its Final Results, Commerce held as follows:

[A]n adjustment should be made to account for after-sale warehousing expenses. Guangdong Minmetals reported that it stored finished merchandise in a warehouse for an average of one week after the time of sale and before the time of shipment. Therefore, *** we made an adjustment to constructed value, using, as the best information otherwise available, petitioners' estimate of the average U.S. costs for storing finished castings in rented warehouses during 1988.

Final Results, 56 Fed. Reg. at 2,745.

D & L claims that this adjustment was inappropriate for several reasons. First, D & L claims that "after-sale" warehousing costs generally refer to warehousing that is relatively lengthy and is a condition of the sale. *D & L Memorandum* at 28.

D & L also claims that Commerce erred in using U.S. costs for storing finished castings as best information available. It claims that by using these costs Commerce penalized Guangdong Minmetals since it cooperated fully with its information requests. *D & L Memorandum* at 29.

In its questionnaire for the 1988-89 review period, Commerce requested Guangdong Minmetals to specifically identify the sales on which it incurred after-sale warehousing expenses, the amount of expense attributable to each sale, any allocations used and the source of the data. AR (Pub.) Doc. 62 at B-11. Guangdong Minmetals responded by simply stating that the "subject merchandise was] stored in Minmetals Guangdong's own warehouse for a short period before shipment. The average time of storage was about one week." AR (Pub.) Doc. 89 at 6.

Commerce subsequently filed a deficiency letter with Guangdong Minmetals requesting clarification of the date, terms of sale, the manner in which the customer orders were received and whether sales were off the shelf or made to order. AR (Pub.) Doc. 98. Commerce also requested that Guangdong Minmetals report any after-sale warehouse expenses that were incurred. *Id.* at 3. Guangdong Minmetals provided little information and no documentation in response to this request compelling Commerce to use United States data.

In *Novachem, Inc. v. United States*, 16 CIT ___, 797 F. Supp. 1033 (1992), the court similarly affirmed Commerce's use of United States industry data when a respondent failed to cooperate, stating that 19 U.S.C. § 1677b(c) "does not prohibit and Commerce's regulations provide that the United States may be used for surrogate pricing." *Id.* at ___, 797 F. Supp. at 1038. Thus, this Court agrees that in this case Commerce also acted reasonably in making an adjustment to Guangdong Minmetals' constructed value for "after-sale" warehousing costs and, therefore, plaintiff D & L's motion is denied and this issue is hereby affirmed.

8. Depreciation Estimate:

Plaintiff D & L also contests Commerce's use of petitioner's depreciation estimate as best information available. *D & L Memorandum* at 30. Commerce requested information relating to the Chinese respondents' machinery for both periods of review to value depreciation expenses. Specifically, Commerce requested interested parties to provide a "surrogate value for each piece of machinery used to produce iron construction castings or a methodology for determining depreciation expense for each period of review." *Final Results*, 56 Fed. Reg. at 2,747. In its *Final Results*, Commerce stated that "[r]espondents did not provide sufficient information prior to the preliminary results of review to demonstrate that the Chinese producers of iron construction castings had no depreciable assets during the review period." *Id.*

Upon reviewing the information submitted in this case, the Court deems respondents' submissions as adequate. On August 28, 1989, Beijing Metals & Minerals Import & Export Corporation ("Minmet Bei-

jing") submitted information listing all assets and their date of purchase and further stated the current government regulation for depreciation of assets in the foundry. AR (Pub.) Doc. 88, Exhibit 8. On March 14, 1990, Minmet Beijing and Guangdong Minmetals supplied information concerning depreciation rates from India. AR (Pub.) Doc. 118. Respondents further supplied Commerce with the dates of acquisition or construction of the major items of equipment used to manufacture iron castings. AR (Pub.) Doc. 21 at 11.

Moreover, as D & L notes in its brief, the United States depreciation figures that Commerce used are inapposite as there is no indication that the type of equipment used in the United States and in China are similar. *D & L Memorandum* at 31.

According to 19 U.S.C. § 1677e(c), Commerce is authorized to use best information available when a party is unable or does not provide Commerce with the necessary information with which to make its determination. Use of the best information available rule is not to be resorted to when respondents have supplied adequate information. In this case, the Court deems respondents' submissions as sufficient and, therefore, this case is remanded to Commerce to recalculate the depreciation expenses using the information supplied by respondents.

9. *Raw Materials:*

Plaintiffs Deeter Foundry, Inc., Alhambra Foundry, Inc., Allegheny Foundry, Co., Bingham & Taylor Division, Virginia Industries Inc., Campbell Foundry Co., Charlotte Pipe & Foundry Co., East Jordan Iron Works, Inc., Lebaron Foundry Inc., Municipal Castings, Inc., Neenah Foundry Co., Opelika Foundry Co., Inc., Pinkerton Foundry Inc., Tyler Pipe Industries Inc., U.S. Foundry & Manufacturing Co. and Vulcan Foundry, Inc. ("Deeter") claim that Commerce improperly valued some of the raw material factors using Philippine import statistics while valuing other raw material factors using U.S. costs. *Deeter's Memorandum of Points and Authorities in Support of Motion for Judgment Upon the Agency Record (Deeter Memorandum)* at 12. Deeter clarifies that it has no objection to Commerce's exclusive use of Philippine import statistics or United States costs to value the factors of production. It does, however, object to the use of the two different valuation methods. *Id.* at 12-13.

Deeter claims that in its preliminary determination Commerce relied on Philippine import statistics to value the raw material factors of production. *Id.*; AR (Pub.) Doc. 121. In their case briefs, the respondents and importers objected to certain import categories chosen by Commerce, claiming that the values reported for the specific import categories were higher than the United States costs reported by petitioners. AR (Pub.) Doc. 158. Commerce reevaluated its decision to use Philippine import statistics in the final determination. Commerce's Final Results memorandum states that the import category for sand includes two types of sand, foundry and blasting sand. Commerce subsequently rejected the Philippine import statistics for sand because they found

that foundry sand was generally less expensive than blasting sand. On the same note with respect to other raw materials, Commerce noted that

in light of similar discrepancies with respect to bentonite, talc powder, thinner and banana oil, we have reevaluated our preliminary decision to separately value each indirect material used in the production of iron construction castings with the weighted-average import price into the Philippines.

Final Results, 56 Fed. Reg. at 2,746.

Deeter accepts that there were discrepancies between foundry sand and blasting sand because these discrepancies were documented on the record. AR (Pub.) Doc. 179. For example, Commerce's analyst contacted a sand expert who noted the discrepancies. *Id.* Deeter claims that there is no such documentation to support "similar discrepancies" with respect to the other mentioned raw materials.

Defendant-intervenor D & L, however, disagrees with Deeter and claims that Commerce acted reasonably. *Defendant-Intervenor D & L Supply Co.'s Memorandum of Points and Authorities in Opposition to Plaintiffs Deeter Foundry, Inc., et al. Rule 56.1 Motion For Judgment on the Agency Record ("Defendant-Intervenor D & L Memorandum")* at 6-12.

Nevertheless, after reviewing Deeter's arguments, Commerce has now concluded that Deeter is correct with respect to this issue and asks the Court to remand this issue to Commerce so that Commerce may clarify why it valued the other indirect materials in the same manner as it did sand, using United States industry data. *Defendant's Memorandum* at 59.

Commerce also states that, if necessary, it should be permitted to gather more information regarding the appropriate basis for valuing these input materials. *Id.* Therefore, this case is remanded to Commerce to clarify why it valued indirect materials using United States industry data and to gather more information if necessary.

Deeter also claims that the use of Philippine import statistics to value pig iron, scrap iron and coke, which Commerce considered direct input materials, contained the same discrepancies as the indirect materials and, therefore, should not have been used to value the factors of production. *Deeter Memorandum* at 17. Deeter feels that Commerce acted inconsistently. *Id.* Commerce, however, does not necessarily agree with Deeter that all of the input categories for direct materials contained discrepancies, but concedes that to the extent the record is unclear it asks this Court to remand the case so that Commerce can review and or revise its decision if necessary. *Defendant's Memorandum* at 59-60. The Court agrees and, therefore, this issue is also remanded to Commerce to review and/or revise its decision regarding direct materials.

10. *Manufacturing Costs:*

Plaintiff Deeter also claims that Commerce erred in failing to include all costs incurred by the Chinese producers to manufacture castings. *Deeter Memorandum* at 19. Although Commerce originally decided that

verification was necessary in the first review, it cancelled verification because of civil unrest in the People's Republic of China. *Id.* Deeter now claims that when faced with omissions or contradictions in data, Commerce either presumed that no costs were incurred or used the lowest factor or value available to calculate the dumping margins. *Id.* Specifically, plaintiff Deeter claims that Commerce failed to (a) calculate the cost of special features and bolts sold with the castings, (b) account for skilled laborers that were used to manufacture castings, and (c) account for all overhead costs incurred by the Chinese respondents. *Id.*

(a) *Special Features and Bolts.* Deeter first claims that Commerce failed to account for the cost of bolts, attachments and other special features sold with iron construction castings. *Id.* at 20. Upon review of its response to this allegation in the final results, Commerce concedes that a discrepancy may exist with respect to this issue and that a remand is in order to review the record. *Defendant's Memorandum* at 76-77. For this reason, this issue is remanded to Commerce to review the record and determine whether all such materials have been accounted for.

(b) *Skilled Laborers.* Deeter also claims that Commerce failed to account for certain labor costs. Commerce, however, claims that Deeter failed to exhaust its administrative remedies because it did not raise this particular challenge in its case or rebuttal briefs before Commerce. *Defendant's Memorandum* at 72.

According to 19 C.F.R. § 353.38(a) (1991): "The Secretary will consider in making the final determination * * * only written arguments in case or rebuttal briefs filed within the time limits in this section."

Deeter claims that the domestic industry did raise this issue numerous times during the administrative proceedings, albeit not in its case or rebuttal briefs, but during the administrative proceeding nevertheless. *See* AR (Pub.) Docs. 36 at 8, 52 at 8, 53 at 8, 57 at 13, 58 at 15-16, 68 at 10, 69 at 10, 94 at 14-15, 95 at 9-10, 109 at 5-6, 110 at 14, 113 at 20-22, 114 at 6, 116 at 6-7.

Although a party cannot bring up an issue on appeal when it has not exhausted its administrative remedies, there is an exception to this rule if to bring up the issue would be futile. *See Rhone Poulenc*, 7 CIT at 136, 583 F. Supp. at 611. This instance falls within the futility exception to the rule because plaintiffs repeatedly raised this issue during the administrative proceedings and, therefore, the Court will now address plaintiffs' argument.

Upon reviewing the record in this case, the evidence is conflicting. Deeter claims that Commerce failed to account for certain labor costs, namely skilled labor. *Deeter Memorandum* at 23-24. Because Commerce was unable to verify the information submitted by the respondents, it based its determination on direct and indirect labor solely on the information submitted which stated that there was no skilled labor. *Defendant's Memorandum* at 73. However, the drawings submitted by the respondents indicated the involvement of skilled machinists. Respondents also used lathes, which require skilled labor for operation.

Deeter Memorandum at 23-24. Deeter now claims that Commerce's determination of labor costs are not supported by substantial evidence on the record and that this issue should thus be remanded for further investigation. *Deeter Memorandum* at 25; *Reply of Deeter Foundry, Inc. et al. to Defendant's and D & L Supply Co.'s Opposition to Motion for Judgment Upon the Agency Record* at 10.

Upon review of the evidence in this case the Court agrees and, therefore, Deeter's motion on this issue is granted and this case is remanded for further investigation on whether labor costs were skilled or unskilled.

(c) *Overhead Costs.* Plaintiff Deeter also claims that Commerce failed to account for all overhead costs incurred by respondents. *Deeter Memorandum* at 25. At oral argument, counsel for Deeter stated that typically factory overhead includes indirect materials and indirect labor costs. Deeter further admits that respondents provided limited data pertaining to overhead costs in their questionnaire responses. *Id.*; AR (Pub.) Docs. 88-89. Commerce subsequently sent deficiency letters to respondents seeking more detailed information on overhead costs. AR (Pub.) Doc. 97 at 5; (Pub.) Doc. 98. Respondents noted that they incurred maintenance costs as part of their overhead costs, yet no explanation of these costs was provided. AR (Pub.) Doc. 22 at 10. Deeter claims that although respondents failed to adequately include factors for these costs, these costs should not be excluded from the calculations altogether. Furthermore, Deeter now claims that petitioners did include in their submissions complete costs related to overhead costs, including expenses for depreciation, utilities, indirect materials, parts, indirect labor, maintenance workers, depreciation and interest expense. They further claim, however, that Commerce did not rely on all the information submitted. *Deeter Memorandum* at 26. Deeter claims that Commerce failed to include these costs in its factor-of-production analysis because the respondents failed to report them in their questionnaire and deficiency responses. *Id.*

Commerce, on the other hand, claims that it reasonably exercised its discretion in calculating the overhead costs incurred by the Chinese producers. *Defendant's Memorandum* at 74-75. Commerce further contends that the overhead costs were captured in other portions of the constructed value calculations.

The administrative record, however, is unclear of this fact and Commerce has also not clarified this in its briefs. AR (Conf.) Doc. 23. Commerce stated that it reasonably considered such fixed costs to have been included in direct factory overhead (including depreciation) and other areas. AR (Pub.) Doc. 121 at 7, 10-11. It is not obvious to the Court that this is the case.

It is well settled that "[c]entral to a proper determination by Commerce is some discussion on the record" as to its determinations. See *Toho Titanium Co. v. United States*, 11 CIT 160, 167, 657 F. Supp. 1280, 1286 (1987); see also *NSK Ltd. v. United States*, 16 CIT ___, ___,

809 F. Supp. 115, 118-19 (1992); *Koyo Seiko Co. v. United States*, 17 CIT ___, ___, 810 F. Supp. 1287, 1293 (1993). In *NSK Ltd.*, this Court remanded the case to Commerce to either reconsider its determination or to substantiate on the record its rationalization. *NSK Ltd.*, 16 CIT at ___, 809 F. Supp. at 119. In light of the circumstances in the case at hand, the Court deems the same remedy appropriate in this case and, therefore, this case is remanded to Commerce to reconsider the information submitted by petitioners regarding overhead costs, or to substantiate on the record why it should not, or to point out in the record where these overhead costs were included.

11. *Inland Freight Costs:*

Plaintiff Deeter also claims that Commerce erred in failing to make proper adjustments for inland freight costs incurred to transport raw materials to the foundries. *Deeter Memorandum* at 29. To value pig iron, scrap iron and coke, Commerce relied on Philippine import statistics. *Id.* These statistics included the freight required to transport materials from the point of production in the foreign country to the point of export, and the ocean freight necessary to transport the goods from the country of origin to the Philippines. *Id.*; *Final Results*, 56 Fed. Reg. at 2,746. Commerce noted that the import prices included

the inland freight required to transport materials from the point of production to the point of export, and, the ocean freight required to transport the goods from the country of origin to the Philippines. Since foreign inland freight is already included in the weighted-average import prices used to value each material, we have not increased material prices to account for the freight expense of transporting materials from the point of purchase to the foundry for the final results of review.

Id.

Deeter claims that Commerce disregarded the actual freight factors reported by the Chinese respondents and, thus, improperly understated the inland freight costs incurred to transport the raw materials from the suppliers to the Chinese foundries. *Deeter Memorandum* at 31. The import data, however, which Commerce relied upon to value the material input inland freight costs represented a weighted-average of the freight costs from a number of market economy countries. *Final Results*, 56 Fed. Reg. at 2,746. In fact, as Deeter claims, the import statistics might have understated the Chinese costs. By the same token, they might have overstated them as well.

Nevertheless, Commerce still ignored actual data submitted by respondents. The data they submitted might have been more difficult to use and it is easy to forsake actual data for best information available, but this investigative tool is often used too freely.

The primary purpose of the best information available statute is to provide Commerce with a means of conducting its investigation when a party "refuses or is unable to produce information requested in timely manner and in the form required" or when a party "otherwise signifi-

cantly impedes an investigation." See 19 U.S.C. § 1677e(b). This was not the case here. Actual data was on the record in this case and Commerce should have used it. Therefore, this case is remanded to Commerce to recalculate freight costs using the information on the record which was submitted by respondents.

12. *Reimbursement to U.S. Importers:*

Plaintiff Deeter also claims that Commerce failed to investigate whether Chinese castings producers reimbursed U.S. importers of Chinese castings for U.S. antidumping duty payments. *Deeter Memorandum* at 31. During the administrative review, petitioners alleged that Minmet Beijing and Guangdong Minmetals "may be reimbursing their importers for antidumping duties." AR (Pub.) Doc. 35 at 9; (Pub.) Doc. 116 at 8.

Prior to the Preliminary Results, respondents stated that no reimbursements occurred. See *Defendant's Memorandum* at 77; see also AR (Conf.) Doc. 34. In its Final Results, Commerce addressed this issue and stated:

Petitioners have provided no evidence on the record that respondents are reimbursing importers for antidumping duties on sales subject to these reviews. Furthermore, 19 CFR 353.26 requires that importers certify to the U.S. Customs Service that they have not entered into an agreement with the manufacturer or exporter for the payment or refunding of antidumping duties. Therefore, any reimbursement is an appropriate matter for the U.S. Customs Service.

Final Results, 56 Fed. Reg. at 2,745.

According to 19 C.F.R. § 353.26(a)(1), in calculating United States price, Commerce "will deduct the amount of any antidumping duty which the producer or reseller: (i) Paid directly on behalf of the importer; or (ii) Reimbursed to the importer." Paragraph (b) requires the importer prior to liquidation to file a certification with the U.S. Customs Service stating that it has not paid or been reimbursed for dumping duties. 19 C.F.R. § 353.26(b). Commerce may presume from an importer's failure to file the certificate required in paragraph (b) that the producer or reseller paid or reimbursed the antidumping duties. 19 C.F.R. § 353.26(c). The regulations do not impose upon Commerce an obligation to investigate based on mere allegations.

In this case, petitioners have not set forth any evidence to support the claim that the reimbursement was taking place or that the importers had failed in the past to file the requisite certifications. Therefore, Commerce's determination on this issue is reasonable and is hereby affirmed.

13. *Clerical Errors:*

Plaintiff Deeter lastly claims that Commerce committed several clerical errors in calculating its dumping margins. Specifically, Deeter claims that Commerce (1) improperly calculated the amount of aluminum consumed in production, and (2) improperly calculated the amount of fireclay consumed in production.

Commerce concedes that two errors exist. Commerce concedes it improperly calculated the amount of aluminum consumed in production and the amount of fireclay consumed in production and, therefore, agrees with Deeter that these matters should be remanded to Commerce. *Defendant's Memorandum* at 79-80. Therefore, this case is remanded to Commerce for correction of these clerical errors.

Deeter alleges a third clerical error, that being that Commerce failed to calculate properly the raw material factors that were valued using petitioners' additives and supplies data. Deeter claims that in relying upon petitioners' additives and supplies data to value certain factors of production, Commerce improperly failed to include freight-in costs for procuring these items. *Deeter Memorandum* at 33.

Defendant-intervenor D & L Supply Co. claims that Commerce did not commit a clerical error regarding raw material factors. *Defendant-Intervenor D & L Memorandum* at 20. D & L further states that if Commerce included freight in the cost of additives, then it would risk double counting of freight since the freight is possibly already accounted for in the costs reported by petitioners for the additives themselves. *Id.*

Commerce acknowledges that it has already requested that the Final Results be remanded to allow Commerce to review and, if necessary, to revise its decision regarding the appropriate basis for valuing the factors of production. *Defendant's Memorandum* at 79-80. Since this clerical error alleged by Deeter pertains to this issue, Commerce requests that it be permitted on remand to review Deeter's allegation involving freight costs. *Id.* The Court agrees and this case is remanded for this purpose.

CONCLUSION

In accordance with the foregoing opinion, plaintiffs' motion for judgment on the agency record is granted in part and this case is remanded to Commerce to (1) assess duties against MACHIMPEX Liaoning at the 11.6% deposit rate that it paid upon importation; (2) seek further information from Guangdong regarding its independence and if it is satisfied that Guangdong is an independent company, Commerce shall set a company-specific rate for Guangdong; if not, then Commerce may continue to apply a country-wide rate for Guangdong; (3) recalculate the depreciation expenses using the information supplied by respondents; (4) clarify why it valued other indirect materials in the same manner as it did sand by using U.S. industry data and gather more information if necessary; (5) review or revise its decision regarding direct materials; (6) determine whether all the costs regarding bolts, attachments and other special features were accounted for; (7) further investigate whether labor costs were skilled or unskilled; (8) reconsider the information submitted by petitioners regarding overhead costs, or to substantiate on the record why it should not; (9) recalculate freight costs; (10) correct clerical errors involving the amounts of aluminum and fireclay consumed in production; and (11) review Deeter Foundry, Inc.'s allegations regarding the raw material factors.

Plaintiffs' motion is denied in all other respects. Remand results are due within ninety (90) days of the date this opinion is entered. Comments to remand results are due thirty (30) days thereafter. Responses to comments are due within fifteen (15) days of the date comments are due.

(Slip Op. 93-231)

NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., AND NTN CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 91-08-00577

Dated December 8, 1993

TSOUCALAS, Judge: This Court, having remanded this case to the Department of Commerce, International Trade Administration ("Commerce") on July 13, 1993, to recalculate NTN's (1) variable costs of manufacture by merging the variable costs of manufacture for only home market bearing families, (2) cost of production and constructed value without resorting to best information available; and (3) dumping margins to account for the 46 sales at issue only once, and Commerce having done so as reported in its remand results dated September 27, 1993, it is hereby

ORDERED that the remand results in this case are affirmed, and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

(Slip Op. 93-232)

CHANG TIEH INDUSTRY CO., LTD., PLAINTIFF AND DEFENDANT-INTERVENOR, AND AVESTA SHEFFIELD, INC., BRISTOL METALS, INC., DAMASCUS TUBE DIV., DAMASCUS-BISHOP TUBE CO., TRENT TUBE DIV. OF CRUCIBLE MATERIALS CORP., AND UNITED STEELWORKERS OF AMERICA (AFL-CIO/CLC) PLAINTIFFS AND DEFENDANT-INTERVENORS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 93-01-00053

[Chang Tieh's motion for judgment on agency record granted. Avesta's motion for judgment on agency record denied.]

(Dated December 9, 1993)

Grunfeld, Desiderio, Lebowitz & Silverman (David L. Simon and Jeffrey S. Grimson) for plaintiff and defendant-intervenor Chang Tieh Industry Co., Ltd.

Collier, Shannon, Rill & Scott (David A. Hartquist, Jeffrey S. Beckington and Kathleen W. Cannon) for plaintiffs and defendant-intervenors Avesta Sheffield, Inc., et al.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Cynthia B. Schultz*), *Marguerite E. Trossevin*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

OPINION

RESTANI, *Judge*: In this case, the domestic industry and a foreign manufacturer both challenge an antidumping duty determination by the United States Department of Commerce, International Trade administration ("ITA"). ITA's determination excluded the foreign manufacturer Chang Tieh Industry Co., Ltd. ("Chang Tieh") from an antidumping order on certain conditions. *Certain Welded Stainless Steel Pipes from Taiwan*, 57 Fed. Reg. 53,705, 53,709 (Dep't Comm. 1992) (final determ. of sales at less than fair value) (requiring Chang Tieh's consent to conditions) ("*Final Results*"); *Certain Welded Stainless Steel Pipe from Taiwan*, 57 Fed. Reg. 62,300, 62,301 (Dep't Comm. 1992) (amended final determ. & antidumping duty order) (excluding Chang Tieh after having received its consent to conditions) ("*Amended Final Results*"). Among these conditions was Chang Tieh's acquiescence to the immediate application of the antidumping order if ITA subsequently found that Chang Tieh "has sold or is likely to sell subject merchandise to the United States at less than its foreign market value." *Id.*

Chang Tieh moves for judgment on the agency record on the ground that the conditional exclusion was an inappropriate exercise of ITA's power. Avesta Sheffield, Inc. ("Avesta"), representing the domestic industry, argues that the court has no jurisdiction over Chang Tieh's challenge of the agency determination. Avesta also moves for judgment on the agency record, contending that data concerning Chang Tieh's sales do not support its exclusion from the antidumping order.

In resolving Avesta's motion, the court will address the following issues: 1) whether Chang Tieh's sales data were unrepresentative or not *bona fide* and should have been disregarded, 2) whether ITA should have determined that the foreign market value ("FMV") was duty-inclusive before granting a duty drawback, 3) whether ITA should have adjusted either U.S. price or FMV to account for value-added taxes ("VAT"), and 4) whether ITA properly allocated Chang Tieh's labor and overhead costs. ITA's determination will be sustained if it is supported by substantial evidence on the record and is otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988).

BACKGROUND

On November 18, 1991, Avesta and other representatives of the domestic steel pipe industry ("petitioners") filed with ITA petitions alleging dumping by Chang Tieh and other foreign manufacturers. *Certain Welded Stainless Steel Pipes from the Republic of Korea and Taiwan*, 56 Fed. Reg. 65,043, 65,043 (Dep't Comm. 1991) (init. of antidumping duty investigations). Based on petitioners' submissions, ITA initiated an antidumping duty investigation on December 13, 1991. *Id.* at 65,044.

The United States International Trade Commission ("ITC") reached an affirmative preliminary determination of injury in January 1992. *Certain Welded Stainless Steel Pipes from the Republic of Korea and Taiwan*, USITC Pub. 2474, Inv. Nos. 731-TA-540 and 541 (Jan. 1992)

(prelim. determ.). ITC found a reasonable indication that the domestic industry was materially injured due to imports of Korean and Taiwanese stainless steel pipe, which were allegedly sold at less than fair value ("LTFV") *Id.* at 1. ITA subsequently issued an affirmative preliminary determination of LTFV sales, calculating Chang Tieh's dumping margin to be zero. *Certain Welded Stainless Steel Pipes from Taiwan*, 57 Fed. Reg. 27,735, 27,730 (Dep't Comm. 1992) (prelim. determ. of LTFV sales & postponement of final determ.).

On July 1, 1992, petitioners informed ITA of their suspicion that Chang Tieh had sold its "merchandise in intentionally small volumes and at artificially inflated prices inconsistent with commercial reality for the purpose of avoiding antidumping duty liability. See *Final Results*, at 53,706. Petitioners' preverification comments, submitted on July 2, alleged collusion between Chang Tieh and its U.S. importer and compared Chang Tieh's prices to those of other importers in an attempt to show that Chang Tieh had priced its goods above market value. Appendix to Memorandum of Points and Authorities in Support of Motion by Plaintiffs Avesta Sheffield, Inc., et al., for Judgment Upon the Agency Record ("Avesta's Appendix"), Doc. 6, at 2-4. Approximately two weeks later, ITA received a confidential two-page affidavit repeating petitioners' allegations with regard to collusion. *Id.*, Doc. 7, Attachment 1. ITA granted anonymity to petitioners' sources of information on September 2, 1992. *Final Results*, at 53,706.

Petitioners filed additional affidavits on September 10 and 21 without providing redacted versions. *Id.* Officials at ITA spoke with the affiants on September 22 in order to confirm their identities and their knowledge of information contained in the affidavits. Avesta's Appendix, Doc. 5, at 1. On September 23, petitioners prepared redacted versions of the affidavits, but refused to serve them on other interested parties. *Final Results*, at 53,706. ITA made several subsequent requests for public versions that could be released pursuant to the administrative protective order. *Id.* Public versions were finally submitted on November 3. *Id.*

Despite the delay in issuing public versions of the additional affidavits, Chang Tieh received notice of petitioners' concerns and a copy of the first affidavit detailing their allegations in July 1992. Avesta's Appendix, Doc. 3, at 3 (certificate of service on Chang Tieh); *id.*, Doc. 7, Attachment 1, at 3 (certificate of service on Chang Tieh). In late September and early October, ITA sent inquiries to Chang Tieh and its U.S. importer, who both provided ITA with arguments and data to rebut the allegations. *Final Results*, at 53,706; Avesta's Appendix, Docs. 17 & 19.

On November 12, ITA issued a final affirmative determination of LTFV sales, finding a zero dumping margin for Chang Tieh.¹ *Final Results*, at 53,722. ITA adjusted Chang Tieh's U.S. price upward for duty drawback on raw materials imported into Taiwan and then converted into steel pipe for export. *Id.* at 53,709-10. Rather than tracing

¹ ITA did not use a "best information available" ("BIA") margin as requested by Avesta. The margin determination was based on verified sales data from Chang Tieh, although ITA did resort to partial BIA in the calculation of ocean freight charges. *Final Results*, at 53,712.

the raw materials from import to export as finished goods, ITA confirmed that the manufacturer had imported sufficient raw materials to make the quantity of goods eventually exported to the United States. *Id.* at 53,710. ITA adjusted U.S. price for VAT without performing an econometric analysis to determine whether the tax had been passed through to the consumer. *Id.* ITA also made a circumstance of sale adjustment to foreign market value based on VAT issues. *Id.*

Because of its concerns regarding Chang Tieh's possible creation of an artificially high U.S. price, ITA directed Chang Tieh to provide a Certification "similar to those required under [19 C.F.R.] §§ 353.14 and 353.25(b)" before excluding Chang Tieh from the dumping order. *Id.* at 53,709. The "similar" certification constituted an affirmation by Chang Tieh that it had not dumped goods in the past and would not dump goods in the future.² *Id.* The dissimilar condition contained in the certification, and the condition that led to Chang Tieh's challenge to the determination at issue, was the requirement of Chang Tieh's consent to the immediate application of the antidumping order "if the Department determines at any time during the existence of the antidumping order that [Chang Tieh] has sold or is likely to sell the subject merchandise to the United States at less than its foreign market value." *Id.* Chang Tieh submitted the certification under protest, reserving all legal rights. Avesta's Appendix, Doc. 24, Attachment B, at 1. ITA issued an antidumping order excluding Chang Tieh on December 30, 1992. *Amended Final Results*, at 62,301.

DISCUSSION

I. AVESTA'S MOTION FOR JUDGMENT ON THE AGENCY RECORD

A. *Exclusion of Unrepresentative Sales from U.S. Price Data Pool:*

Avesta argues that the questionable nature of Chang Tieh's U.S. sales data should have caused ITA to ignore the data as being unrepresentative and to apply BIA to determine a dumping margin. *See* 19 U.S.C. § 1677e(b), (c) (1988) (mandating use of BIA if data cannot be verified or are not produced in a timely manner and in the form required). Chang Tieh responds that its U.S. sales were typical of its normal business practices and that ITA had no discretion to discard the entire sales base on the ground of unrepresentativeness.

The antidumping statute directs ITA to calculate *foreign market value* on the basis of sales trade "in the ordinary course of trade for home consumption." *Id.* § 1677b(a)(1)(A) (1988). Sales intended to establish a fictitious market are excluded from the computation of foreign market value. *Id.* § 1677b(a)(1). The statutory and regulatory definitions of U.S. price do not contain similar limitations. *See id.* § 1677a (1988); 19 C.F.R. § 353.41 (1992). This court has reasoned,

if Congress intended to require [ITA] to exclude all "sales made outside the "ordinary course of trade" from its determination of United

² Chang Tieh made the same representations in open court and this aspect of the certification is not the essential point of dispute.

States price it could have provided for such an exclusion in the definition of United States price, as it has in the definition of foreign market value. It has not done so.

Ipsco, Inc. v. United States, 12 CIT 304, 394, 687 F. Supp. 633, 641 (1988) ("*Ipsco I*"). ITA is thus not required to disregard automatically all sales made out of the ordinary course of trade in determining U.S. price. *Id.* at 395, 687 F. Supp. at 641.

ITA instead has the discretion to disregard certain U.S. pricing data if "inclusion of certain sales which are clearly, atypical would undermine the fairness of the comparison of foreign and U.S. sales." *Ipsco, Inc. v. United States*, 13 CIT 402, 408, 714 F. Supp. 7211, 1217 (19;9) ("*Ipsco II*"), *rev'd on other grounds*, 965 F.2d 1056 (Fed. Cir. 1992). In *Ipsco II*, the court affirmed ITA's practice of excluding "(1) sales which are not representative of the seller's behavior and (2) sales which are so small that they would have an insignificant effect on the margin." *Id.*, 714 F. Supp. at 1217.

In accordance with this practice, ITA has excluded seven sales of damaged or defective merchandise from a fair value comparison. *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, 57 Fed. Reg. 42,942, 42,949 (Dep't Comm. 1992) (final determ. of LTFV sales). It has also disregarded transactions in which the U.S. customer withheld payment, where the sales comprised less than one percent of the respondent's U.S. trade. *Fabric and Expanded Neoprene Laminate from Taiwan*, 52 Fed. Reg. 37,193, 37,194 (Dep't Comm. 1987) (final determ. of LTFV sales). In contrast, sales of experimental goods have been included in U.S. price because "it is not unusual for a company to sell experimental lines of merchandise." *Ipsco II*, 13 CIT at 408, 714 F. Supp. at 1217.

Avesta argues that Chang Tieh's sales are unrepresentative because other producers of steel pipe, allegedly a fungible commodity, priced their merchandise much lower than Chang Tieh did. Avesta also relies on the small volume of goods exported to the United States by Chang Tieh. The court finds it unusual, if not improper, to refer to the entire corpus of a party's U.S. sales as "unrepresentative," as they are obviously representative of that seller's behavior. Rather, the question seems to be whether the sales are the result of a *bona fide* arm's length transaction. See *PQ Corp. v. United States*, 11 CIT 53, 57-58, 652 F. Supp. 724, 729 (1987) (even a single sale may establish U.S. price if it is the result of a *bona fide* arm's length transaction).

Apparently ITA recognizes it has authority to prevent fraud upon its proceedings. In at least one case ITA discarded a respondent's entire U.S. sales base and applied BIA where documents discovered at verification indicated that information might have been fabricated for the purpose of the investigation. *Sulfanilic Acid from the Republic of Hungary*, 58 Fed. Reg. 8256, 8257 (Dep't Comm. 1993) (final determ. of LTFV sales). Thus, if evidence demonstrated to ITA that Chang Tieh orchestrated an export scheme involving artificially set prices for purposes of

dumping after the investigative period, one would expect ITA to disregard the sales as not resulting from a *bona fide* transaction.

In *PQ*, where ITA found the single U.S. sale *bona fide*, the price of the single sale was lower than a price set by the one known U.S. supplier. 11 CIT at 58, 652 F. Supp. at 729. In this case ITA made no specific finding as to whether the sale was at a higher or lower level than fairly traded sales. There was no evidence that the price charged by Chang Tieh was outside an appropriate market range, disregarding obviously dumped prices. The record does reveal, however, that prices for this merchandise did fluctuate. *Certain Welded Stainless Steel Pipes*, USITC Pub. 2474, at A-47, A-49. There was also some evidence of limited market channels for the exporters at issue. *Id.* at A-40. Obviously, ITA found circumstantial evidence based on price insufficient to conclude a non-*bona fide* transaction existed or that the sales were otherwise unusable.

ITA also accepted and examined Avesta's affidavits alleging fraud. ITA found that affidavits by officials in the domestic industry "raise[d] significant concerns about potential evasions * * * of the antidumping order." *Final Results*, at 53,709. The affidavits, however, are vague and inconclusive. They contain the bare allegation of a conversation between an unidentified representative of Chang Tieh's U.S. customer and an industry official, in which the representative is purported to have admitted to importing a small volume of merchandise at inflated prices in order to elude the imposition of duties. See Avesta's Appendix, Doc. 7, Attachment 1; *id.*, Doc. 8, Attachments 1-2. No hard data substantiating this allegation appears in the administrative record, and it was made clear at oral argument that the representative of Chang Tieh's U.S. customer, who allegedly admitted wrongdoing, was never identified. Apparently ITA found the hearsay evidence insufficiently reliable to support the charges. As stated by ITA, "petitioner's allegation does not constitute sufficient grounds to reject all of [Chang Tieh's] U.S. sales data and resort to BIA." *Final Results*, at 53,711. A review of both the pricing data and the affidavits reveals that ITA did not act unreasonably, nor did it disregard significant evidence in reaching its conclusion in this regard. ITA weighed conflicting evidence and reached a conclusion based on substantial evidence as to U.S. price.

B. Duty Drawback Adjustment:

Avesta argues that ITA misinterpreted the statute by adjusting U.S. price for duty drawback without ensuring that the foreign market value was duty-inclusive.³ This court in *Avesta Sheffield, Inc. v. United States*, Slip Op. 93-217 (Nov. 18, 1993), sustained ITA's duty drawback adjustment despite the exact same argument being raised. *Id.* at 9. The court

³ Section 772(d)(1)(B) of the Tariff Act of 1930, as amended, provides for an upward adjustment to United States price, often referred to as a "duty drawback" adjustment, as follows:

(d) (i) the purchase price and the exporter's sales price shall be adjusted by being—

(1) increased by—

(B) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States.

19 U.S.C. § 1677a(d)(1)(B); see 19 C.F.R. § 353.41(d)(1)(ii).

upheld ITA's use of its two-prong test to determine entitlement to a drawback adjustment: 1) "that the import duty and rebate are directly linked to, and dependent upon, one another" and 2) "that the company claiming the adjustment can demonstrate that there were sufficient imports of imported raw material to account for the duty drawback received on the exports of the manufactured product." *Id.* at 6-7.

ITA applied the same test in the case at bar. *Final Results*, at 53,709. In this case, there is no dispute that the first prong of the test has been met. *Id.* In previous reviews of ITA determinations involving steel coil and the Taiwanese system of drawbacks, this court has concluded that Taiwan does require a producer to demonstrate that a certain linkage exists between duties paid on import and rebated upon export.⁴ *Far East Mach. Co. v. United States*, 12 CIT 972, 975-76, 699 F. Supp. 309, 312-13 (1988). Thus, rebates are made only upon proof that duties were paid on imported raw materials. The ITA confirmed that the Taiwanese system operated in this manner in the case at hand. *Final Results*, at 53,709.

It is clear that in the second prong "there is no requirement that specific input be traced from importation through exportation before allowing drawback on duties paid." *Avesta Sheffield, Inc.*, Slip Op. 93-217, at 8 (quoting *Far East Mach.*, 12 CIT at 975, 699 F. Supp. at 312). ITA's review of Chang Tieh's import permits indicated that sufficient imports of steel coils existed for the claimed exported amounts of finished pipes. *Final Results*, at 53,710. Therefore, Chang Tieh has satisfied both prongs of the test for drawback adjustment.

Avesta's arguments provide no basis from which to conclude that drawback adjustments should not be made unless ITA determines that the cost of the products sold in the home market is duty-inclusive. To require such a finding would add a new hurdle to the drawback test that is not required by the statute. Assuming *arguendo* that the statute would permit ITA to add a new test, there is nothing about this case which suggests that under these facts ITA abused any discretion it had, by not adding the test. ITA's duty drawback adjustment to U.S. price is sustained.

C. Value-Added Tax Adjustment:

Avesta contends that ITA erred in adjusting U.S. price upward for value-added taxes ("VAT") forgiven upon exportation without conducting an analysis of whether the tax was passed through to the home market customer. See 19 U.S.C. § 1677a(d)(1)(c). It further objects to ITA's circumstance of sale adjustment to foreign market value based on VAT. See 19 U.S.C. § 1677b(a)(4)(B).

Both issues have been resolved by recent Federal Circuit opinions. In *Daewoo Elecs. Co. v. United States*, Nos. 92-1558, 1559, -1560, -1561,

⁴ This conclusion is also consistent with other decisions that analyzed the Taiwanese rebate system in the context of trade of other products. See, e.g., *Bicycles from Taiwan*, 48 Fed. Reg. 31,688, 31,690 (Dep't Comm. 1983) (final determ. of LTFV sales).

-1562 (Fed. Cir. Sept. 30, 1993), the Federal Circuit unequivocally determined that ITA need not conduct a pass-through analysis in order to adjust U.S. price to account for VAT. *Id.* at 12-13. Thus, no remand for adjustment to U.S. price is needed. *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573 (Fed. Cir. 1993), concluded that a circumstance of sale adjustment based on VAT was an incorrect application of the statute. *Id.* at 1581. The parties agree, however, that a remand on this issue is unnecessary unless a non-zero margin is a possibility as a result of Avesta's other challenges.

D. Allocation of Costs:

Avesta alleges two principal errors in ITA's allocation of Chang Tieh's labor and overhead costs. First, it objects to ITA's calculation of per ton costs as a ratio between costs incurred exclusively for subject merchandise and tonnage of all manufactured products. Chang Tieh asserts that it excluded only one element of overhead costs—depreciation of a piece of equipment not used to produce steel pipe, the subject merchandise. According to Chang Tieh, no other costs were incurred exclusively for pipe and therefore it was proper to divide the overhead costs for pipe production by the tonnage of all goods manufactured by Chang Tieh. ITA "did not note any inconsistencies" in this methodology. *Final Results*, at 53,713. Neither does the court.

Avesta also faults ITA with basing verification on untrustworthy documents not demonstrative of Chang Tieh's normal cost accounting methodology. Chang Tieh responds that its cost accounting system mirrors its financial accounting system, which ITA examined at verification. It asserts that ITA relied not only on the documents Chang Tieh appended to its questionnaire, but also on verification of the audited financial records. ITA's determination states, "[t]he labor and overhead costs reported by [Chang Tieh] were reviewed at verification and determined to be consistent with [Chang Tieh's] normal cost accounting methodology." *Id.* Avesta has not demonstrated that this finding is unsupported by substantial evidence on the record or is otherwise not in accordance with law. ITA did not err in allocating Chang Tieh's labor and overhead costs.

II. CHANG TIEH'S MOTION FOR JUDGMENT ON THE AGENCY RECORD

As a preliminary matter, this court finds that it has jurisdiction over Chang Tieh's challenge of the administrative determination. It is axiomatic that a prevailing party may not appeal a decision favorable to him. *Freeport Minerals Co. v. United States*, 758 F.2d 629, 634 (Fed. Cir. 1985). The conditional exclusion of Chang Tieh from the antidumping order was not a true exclusion and thus was not favorable to Chang Tieh. Furthermore the issue is ripe and need not await an attempt by ITA to enforce the condition at issue.

The issue before the court on Chang Tieh's motion is the propriety of ITA's demand for a signed certification as a prerequisite to exclusion of

Chang Tieh from the antidumping order. The certification states in relevant part,

if [ITA] has reasonable cause to believe or suspect at any time during the existence of the antidumping order * * * [that] Chang Tieh has sold or is likely to sell the subject merchandise to the United States at less than its foreign market value, then [ITA] may institute an administrative review of Chang Tieh under section 751 of the Tariff Act of 1930, as amended.

Avesta's Appendix, Doc. 24, Attachment A.5

The statutory section concerning final administrative determinations of LTFV sales does not address the question of whether ITA may condition its exclusion determination upon consent to review by investigated parties. See 19 U.S.C. § 1673d(a) (1988). The regulations, however, provide that ITA "will" publish an antidumping duty order that "[e]xcludes any producer or reseller for which [ITA] finds that there was no weighted-average dumping margin." 19 C.F.R. § 353.21(c) (1992) (emphasis added).⁶ Whenever a company is investigated and receives a zero margin, it should thus be excluded from the antidumping order pursuant to 19 C.F.R. § 353.21(c). ITA cites to no case in which a party found to have a zero margin was not excluded.

This court has approved so-called end use certification procedures without explicit support in the regulations, but these procedures bear little or no resemblance to the certification required by ITA in the challenged determination. Further, they do not appear to conflict with any regulations. See *Ipsco, Inc. v. United States*, 13 CIT 489, 494, 715 F. Supp. 1104, 1109 (1989) ("*Ipsco III*"). In *Ipsco III*, ITA's scope ruling excluded goods certified by the end user as not employed in drilling for oil and gas. 13 CIT at 490 & n.1, 715 F. Supp. at 1106 & n.1. The court found the end use certification procedure to be "a reasonable extension of ITA's authority to clarify the scope of antidumping and countervailing duty orders." *Id.* at 494, 715 F. Supp. at 1109 (citing *Mitsubishi Elec. Corp. v. United States*, 12 CIT 1025, 1051, 700 F. Supp. 538, 559 (1988) (upholding ITA's limitation of investigation's scope to subassemblies "dedicated exclusively for use" in cellular mobile telephones, *aff'd*, 898 F.2d 1577 (Fed. Cir. 1990)). The certification required from Chang Tieh, in contrast, was not requested in the context of a scope determination and seems to deny Chang Tieh the automatic right to exclusion granted by 19 C.F.R. § 353.21(c) to those with zero margins.

Once ITA decided, based on the record, that there was no substantial evidence of fraudulent behavior, it was bound to accept its own zero margin finding and act accordingly. ITA essentially admits that the regulation is applicable by its terms and that those terms leave no room

⁵ As indicated, the certification also contains Chang Tieh's promise that it did not engage in past dumping practices and would not do so in the future. *Id.*

⁶ A separate regulation provides that a request for exclusion will be considered only if accompanied by a certification that the company did not dump goods in the past and would not dump goods in the future. 19 C.F.R. § 353.14 (1992). Chang Tieh did not specifically request exclusion. Rather, it was a respondent found to have a zero rate. The regulations require a similar certification from parties requesting a revocation or termination. 19 C.F.R. § 353.25(b)(1) (1992).

for the certification procedure. Nonetheless, it states that on a "case by case" basis ITA may abandon its regulations for good reason. None of the cases cited support such a notion. One case, *NMB Singapore Ltd. v. United States*, 15 CIT 590, 780 F. Supp. 823 (1991), states that ITA may decline to follow its regulations for a "compelling reason." *Id.* at 594, 780 F. Supp. at 827. The cases cited by ITA for this proposition do not support it. In fact, the court in *NMB Singapore* required ITA to follow its regulation. *Id.* at 595, 780 F. Supp. at 827. Thus, the statement was *dictum*. Precedents, procedures and practices may be disregarded for a variety of reasons, as the cases mentioned in *NMB Singapore* and those cited by the government indicate. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983). Regulations are laws. If they are valid they must be followed, until properly rescinded.

ITA made no finding of fraudulent activity, nor did it find "unrepresentativeness" or lack of a *bona fide* transaction. ITA decided, after examining all facts, to grant Chang Tieh a zero rate. *Final Results*, at 53,722. If ITA's concerns as to the reliability of the underlying data were not serious enough to result in imposition of a dumping margin, they should not lead ITA to ignore the lack of a margin altogether. Chang Tieh was excluded from the order and should not be treated as if it was assigned an antidumping duty rate that may be reviewed at any time. The court declines to address the issue of whether ITA could commence a changed circumstances review, as opposed to commencing a new dumping investigation, if Chang Tieh is later alleged to be dumping. That is, the certification may be surplusage. As no subsequent dumping is currently alleged, this issue is not before the court.

CONCLUSION

Avesta's motion for judgment on the agency record is denied. ITA's determination with respect to the treatment of allegedly unrepresentative sales, duty drawback adjustment and allocation of costs is sustained. The adjustment to U.S. price to account for VAT is upheld despite ITA's decision not to perform a pass-through analysis. Adjustments to foreign market value based on VAT were improper, but remand is not requested for this factor alone. Chang Tieh's motion for judgment on the agency record is granted. The certification is invalid and may not be relied on by ITA to commence an administrative review of Chang Tieh. Any such review must have another basis.

(Slip Op. 93-233)

RICHARD TARNOVE, PLAINTIFF *v.* LLOYD BENTSEN, SECRETARY OF THE
TREASURY, GEORGE J. WEISE, COMMISSIONER OF CUSTOMS, AND UNITED
STATES, DEFENDANTS

Court No. 92-02-00120

[Plaintiff's motion for judgment on the agency record denied. Judgment entered for defendants.]

(Dated December 10, 1993)

Peter S. Herrick, for plaintiff.

Frank W. Hunger, Assistant Attorney General, Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Mark S. Sochaczewsky*), *Richard S. Friedland*, Senior Attorney, Office of the Regional Counsel, United States Customs Service, of counsel, for defendants.

OPINION

RESTANI, *Judge*: Plaintiff Richard Tarnove, president and sole owner of International Freight Network, Inc. ("IFN"), appeals from the decision of defendant Secretary of the Treasury ("Secretary") denying him a customs broker's license pursuant to 19 C.F.R. § 111.16(b) (1991) and seeks judgment on the agency record pursuant to USCIT Rule 56.1. The denial came after a finding that plaintiff had unlawfully held himself out to the public as a customhouse broker by listing IFN as such in a phone directory, and that IFN transacted customs business without the requisite customs broker's license. For the reasons that follow, the motion is denied.

JURISDICTION AND STANDARD OF REVIEW

This court has exclusive jurisdiction over denials of customs broker's licenses pursuant to 28 U.S.C. § 1581(g)(1) (1988). The Secretary's decision to deny plaintiff a customs broker's license will be set aside if the decision was unsupported by substantial evidence, was an abuse of discretion, or was otherwise not in accordance with law. 5 U.S.C. § 706(2)(A), (E) (1988); *Bell v. United States*, Slip Op. 93-218, at 11 (Nov. 19, 1993); *Kazangian v. Brady*, 15 CIT 488, 489 (1991). Substantial evidence consists of more than a mere scintilla, and is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Fusco v. United States Treasury Dep't*, 12 CIT 835, 838-39, 695 F. Supp. 1189, 1193 (1988) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

BACKGROUND

Tarnove applied for a customs broker's license on August 22, 1990. In November 1990, he passed the written broker's examination required under 19 C.F.R. § 111.13 (1990). The Customs Service issued a Report of Investigation pursuant to 19 C.F.R. § 111.14(d) (1991) in January 1991.

On February 28, 1992, plaintiff brought this action seeking a determination on his license application. On March 6, 1992 this court ordered the defendants to issue a determination within 30 days. In a letter dated March 23, 1992, the director of the Customs Service's Entry Division denied plaintiff's application pursuant to 19 C.F.R. § 111.16(b)(1), (3), (5) and (6).¹

Tarnove appealed to the Commissioner of Customs on May 18, 1992 pursuant to 19 C.F.R. § 111.17(a) (1992), and the Acting Director of the Office of Trade Operations later affirmed the license denial. The Commissioner of Customs upheld the denial and referred plaintiff's appeal to the Secretary.

Subsequent to the Secretary's denial of plaintiff's appeal, Tarnove filed an amended complaint in this court on October 26, 1992 seeking judicial review of the denial pursuant to 19 C.F.R. § 111.17(c). The court granted Tarnove's motion to amend the administrative record, ordering certain items deleted from the agency record and authorizing limited discovery. On April 19, 1993, the court remanded the case to the Secretary and thereafter certain documents were added to the record.

After reviewing the amended record, the Secretary denied Tarnove's administrative appeal. Tarnove then filed the instant motion for judgment on the administrative record.²

DISCUSSION

I. Hearsay evidence was properly admitted in the administrative proceedings:

As a preliminary matter, the court finds without merit plaintiff's contention that the Secretary's decision to deny plaintiff a customs broker's license is impermissibly based on unauthenticated hearsay evidence. The Secretary's denial was premised on a review of the Customs Service's March 23, 1992 determination to deny issuance of the license.

¹ The pertinent sections provide:

(b) *Grounds for Denial.* The causes sufficient to justify denial of an application for a license shall include, but need not be limited to:

(1) Any cause which would justify suspension or revocation of the license of a broker under the provisions of 111.53;

(3) A failure to establish the business integrity and good character of the applicant;

(5) Any conduct which would be deemed unfair in commercial transactions by accepted standards;

(6) A reputation imputing to the applicant, criminal, dishonest, or unethical conduct, or a record of such conduct. 19 C.F.R. § 111.16(b) (1991).

² On August 23, 1993, Tarnove moved to strike three passages in defendants' Memorandum in Opposition to Plaintiff's Motion for Judgment on the Administrative Record ("Memorandum") pursuant to USCIT Rule 12(f). The court hereby denies the motion but will disregard any factual allegations not included in the administrative record pursuant to USCIT Rule 81(m).

First, the court finds that the Memorandum properly includes the statement that because of time constraints and other considerations, the results of a criminal investigation of the plaintiff were not included in the plaintiff's application report. This statement is a material response to one of plaintiff's contentions and is neither scandalous nor inflammatory.

The court also finds that defendants overstated the record by alleging that Tarnove "accepted and controlled" all customs broker-related correspondence going through the office of Manuel A. Gonzalez, a licensed customs broker operating on IFN's premises. The court will disregard this statement.

Finally, the court finds improper the statements at page seventeen of the Memorandum that attribute to Tarnove sole control of a checking account used by IFN to pay customs duties. The detailed information identifying the account and alleging Tarnove's use of it to pay duties is unsupported by the record and must also be disregarded.

Customs' decision rested in large part on a Bell South ("Bell") telephone directory listing advertising IFN as a customshouse broker, and on the Customs Service district director's assertion, on the basis of further hearsay evidence, that IFN was engaged in the customs business without a license. Plaintiff argues that this evidence must be excluded as unreliable, irrelevant and immaterial hearsay.

"This court has specifically recognized that administrative proceedings are governed by the [Administrative Procedures Act ("APA")], not the Federal Rules of Evidence." *Anderson v. United States*, 799 F. Supp. 1198, 1202 (1992) (citations omitted). Section 556(d) of the APA provides that "[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d) (1988) (emphasis added).

In *Richardson v. Perales*, 402 U.S. 389, 410 (1971), the Supreme Court confirmed that, under the APA, hearsay evidence is "admissible up to the point of relevancy." Agencies may consider hearsay according to its "truthfulness, reasonableness, and credibility", if the evidence is not irrelevant, immaterial or unduly repetitious. *Veg-Mix, Inc. v. U.S. Dep't of Agriculture*, 832 F.2d 601, 606 (D.C. Cir. 1987) (quoting *Johnson v. United States*, 628 F.2d 187, 190-91 (D.C. Cir. 1980)).

Evidence that Tarnove held himself out to the public as a customshouse broker by listing his company as such for four consecutive years was confirmed by Bell, after a review of its business records revealed that Tarnove was always Bell's contact person regarding IFN's advertisement order. As plaintiff concedes, these proceedings are not bound by the Federal Rules of Evidence ("FREs"). Thus, there is no requirement here, as plaintiff suggests, that the phone advertisement be authenticated. It is worth noting that for directories the FREs provide an exception to the hearsay rule. See Fed. R. Evid. 803(17). The exceptions to Rule 803 apply to categories of hearsay evidence that possess sufficient guarantees of trustworthiness to bar their exclusion from federal court. See Fed. R. Evid. 803 advisory committee's note.

Plaintiff further objects to hearsay statements included in two reports issued by the district director and relied upon as a basis for the Secretary's denial. As an initial matter, in civil actions and proceedings, FRE 803(8)(C) creates a hearsay exception for factual findings resulting from an investigation made pursuant to authority granted by law. Fed. R. Evid. 803 (8)(C). The factual findings contained in the district director's reports resulted from an investigation conducted pursuant to 19 C.F.R. § 111.14 (1991) and thus arguably constitute acceptable hearsay evidence, but further inquiry is necessary with respect to the hearsay evidence on which the findings are based. To accept the factual findings without reference to the information upon which they are formed would be to neglect the duty to review the basis for the Secretary's decision.

First, evidence that importers named IFN as their broker need not be disregarded. The importers were neutral parties without any motive to identify Tarnove falsely as their broker. Moreover, although the importers' names are redacted for reasons of confidentiality in two instances, the evidence has indicia of reliability because the findings are dated and appear in a chronology of detailed entries. This evidence is highly relevant in evaluating Tarnove's business integrity under § 111.16 (b)(3) and the Secretary properly relied upon it.

Second, Tarnove fails in his argument for exclusion of evidence that several powers of attorney found by Customs to be on file in the office of Manuel A. Gonzalez, a licensed customs broker, listed IFN or IFN and Gonzalez as broker. Plaintiff's contention, that this evidence is inadmissible because the documents themselves are not contained in the agency record, is unavailing. Tarnove has offered no reason as to a motive to falsify the existence of the documents. Furthermore, other evidence is consistent with the description of the documents found in the record. If plaintiff contends that no such documents existed, he was free to contest that fact before the agency.

This court finds that the hearsay evidence plaintiff has requested be excluded has sufficient indicia of truthfulness, reasonableness and credibility for consideration in an administrative proceeding. As the court has ascertained that the evidence at issue is not inherently unreliable, it need not be disregarded. In the final analysis, it is up to the agency to assess the reliability of such evidence and to weigh it against all the evidence of record.

II. There is substantial evidence in the agency record to deny plaintiff a customs broker's license:

The administrative record supports the Secretary's decision to affirm denial of the license pursuant to 19 C.F.R. § 111.16(b). This section of the regulations requires that applicants for customs broker's licenses meet high standards of integrity. This court recognizes that the Secretary has some degree of discretion in determining if these standards have been met. *See Pietrofeso v. United States*, 801 F. Supp. 743, 747 (Ct. Int'l Trade 1992).

The Secretary's finding that plaintiff held himself out to the general public as a customshouse broker, by advertising IFN under that listing category in the Bell directory, is strong evidence that plaintiff engaged in unethical conduct warranting a denial of a broker's license under § 111.16(b)(3). Tarnove's contention that he was not responsible for the advertisement and tried to have it removed is unpersuasive and colors the remainder of the record. As president and sole owner of IFN, Tarnove should have been aware of an advertisement listing his company as a customshouse broker continuously over a five year period. Bell's business records, indicating that Tarnove was their contact at IFN, clearly support a finding that plaintiff knew about the advertisement. Moreover, plaintiff tried to remove the advertisement only after the Customs Service began investigating his application.

Equally damaging to Tarnove's claim of business integrity is the cumulative evidence that he actually transacted customs business without a broker's license in violation of 19 C.F.R. § 111.4.³ First, importers identified IFN as their broker, with one firm naming Tarnove, himself, as its representative. Second, the district director's report indicates, and Tarnove does not challenge, that IFN in fact paid Gonzalez' annual user fee on January 1, 1991.⁴ Finally, the record reveals that a number of powers of attorney kept in Gonzalez' files named IFN as a broker. Taken together, these facts are convincing evidence that plaintiff engaged in the customs business without a broker's license. The Secretary is justified in determining that such conduct constitutes grounds for denying Tarnove a license under 111.16(b).

III. *There was no violation of plaintiff's due process rights:*

Finally, the court finds unavailing plaintiff's contention that "delays" in the determination of his application violated his due process rights. While this court determined in *Pietrofeso v. United States*, 801 F. Supp. 743, 747 (Ct. Int'l Trade 1992), that there is no property interest in obtaining a customs broker's license, it recognizes that agencies must adhere to Congressionally-mandated procedures to avoid acting in a manner which is arbitrary, capricious and not in accordance with law. *PPG Indus., Inc. v. United States*, 13 CIT 183, 190, 708 F. Supp. 1327, 1332 (1989).

Nothing in the administrative record indicates that there was a failure to follow agency procedures in denying plaintiff a customs broker's license. Tarnove was entitled to a prompt decision on his application, *Allen v. Regan*, 9 CIT 176, 177, 607 F. Supp. 133, 134 (1985), but what constitutes a prompt decision must be evaluated in the context of the procedures involved. "[T]here are no statutory or regulatory time limitations placed on * * * an investigation [of an applicant for a customs broker's license]." *Id.* The existence of time limits is implied, *id.*, and thus they cannot be estimated with mathematical certainty. In *Allen*, this court found that the plaintiff's wait of over four years for a decision on his application was unreasonable. *See id.* at 177-78, 607 F. Supp. at

³ "Any person who intentionally transacts customs business, other than as provided in § 111.3, without holding a valid broker's license, shall be liable for a monetary penalty for each such transaction * * *." 19 C.F.R. § 111.4 (1991). A broker's license is not required, pursuant to 19 C.F.R. § 111.3, to conduct the following transactions:

(a) *For one's own account.* An importer * * * transacting Customs business solely on his own account and in no sense on behalf of another

(b) *As employee of brokers.* An employee of a broker, acting solely for his employer, is not required to be licensed where:

(1) *Authorized to sign Customs documents.* The broker has authorized the employee to sign Customs documents on his behalf, and has executed a power of attorney for that purpose * * * or

(2) *Authorized to transact other business.* The broker has filed with the district director a statement identifying the employee as authorized to transact business on his behalf

(c) *Marine transactions.* A person transacting business in connection with entry or clearance of vessels * * * is not required to be licensed as a broker.

(d) *Transportation in bond.* Any carrier bringing Any merchandise to the port of arrival or any bonded carrier transporting merchandise for another may make entry for such merchandise * * * without being licensed as a broker.

19 C.F.R. § 111.3 (1991).

⁴ The annual user fee is assessed for each permit held by an individual (here, Gonzalez), in each district where the broker has a permit to do business. *See* 19 C.F.R. § 111.96(C) (1991). According to Tarnove, this fee was paid in error. As with the directory arguments, the agency did not err in finding this explanation incredible.

134-35. The court did not address the question of a Constitutional due process violation.

Whatever Tarnove's due process rights may be, Tarnove's wait of over a year for a determination on his application did not rise to the level of a due process violation. The administrative record demonstrates that throughout much of that period there was an ongoing correspondence between the government and the plaintiff and between government offices, indicating that plaintiff's application was being actively reviewed. Consequently, any possible inconvenience to plaintiff does not amount to a violation of any due process guarantees which may apply.

In conclusion, then, plaintiff's motion for judgment on the agency record is denied. The Secretary's decision was based on substantial evidence, and was not an abuse of discretion or otherwise not in accordance with law.

(Slip Op. 93-234)

TORRINGTON CO., PLAINTIFF, AND FEDERAL-MOGUL CORP., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., SKF INDUSTRIE, S.P.A., AND FAG CUSCINETTI S.P.A., DEFENDANT-INTERVENOR

Court No. 91-08-00568

Plaintiff, plaintiff-intervenor and defendant-intervenors challenge certain aspects of the Department of Commerce, International Trade Administration's ("ITA") redetermination on remand filed pursuant to *Torrington Co. v. United States*, 17 CIT ___, Slip Op. 93-125 (July, 8, 1993).

Held: Final judgment is entered ordering the ITA to apply Italy's value added tax ("VAT") rate to the United States price ("USP") calculated at the same point in the stream of commerce as where Italy's VAT is applied for home market sales and add the resulting amount to USP. In addition, this case is remanded to the ITA to apply its current administrative practice and choose appropriate best information available ("BIA") for the adjustment to FAG Cuscinetti S.p.A.'s USP for U.S. market discounts and to treat the adjustment as a direct selling expense. ITA's redetermination on remand is affirmed in all other respects.

[Partial final judgment entered and case remanded in part.]

(Dated December 10, 1993)

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon Jr., Geert De Prest, Margaret E. O. Edozien, William A. Fennell, Wesley K. Caine, Myron A. Brilliant, Robert A. Weaver, Patrick J. McDonough and Amy S. Dwyer) for plaintiff.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, J. Eric Nissley, Larry Hampel and Joseph A. Perna, V) for plaintiff-intervenor Federal-Mogul Corporation.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrensis* and *Jane E. Meehan*); of counsel: *John D. McInerney*, Acting Deputy Chief Counsel for Import Administration, *Dean A. Pinkert*, *Stephen J. Claeys*, *D. Michael Kaye* and *Douglas S. Cohen*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Howrey & Simon (Herbert C. Shelley, Scott A. Scheele, Alice A. Kipel, Thomas J. Trendl and Juliana M. Cofrancesco) for defendant-intervenor SKF USA Inc. and SKF Industrie, S.p.A.

Grunfeld, Desiderio, Lebowitz & Silverman (Max F. Schutzman, David L. Simon, Andrew B. Schroth and Matthew L. Pascocello) for defendant-intervenor FAG Cuscinetti S.p.A.

OPINION

TSOUCALAS, *Judge*: Plaintiff, The Torrington Company ("Torrington"), and plaintiff-intervenor Federal-Mogul Corporation ("Federal-Mogul"), commenced this action to challenge certain aspects of the Department of Commerce, International Trade Administration's ("ITA") final results in the first administrative review of imports of anti-friction bearings from Italy. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Italy; Final Results of Antidumping Duty Administrative Reviews*, 56 Fed. Reg. 31,751 (1991). Substantive issues raised by the parties in the underlying administrative proceeding were addressed by the ITA in the issues appendix to *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review ("Issues Appendix")*, 56 Fed. Reg. 31,692 (1991).

BACKGROUND

In *Torrington Co. v. United States*, 17 CIT ___, ___, Slip Op. 93-125 at 30 (July 8, 1993), this Court remanded this case to the ITA to

add the full amount of [value added tax] paid on each sale in the home market to [foreign market value] without, adjustment; to determine if SKF's two methods of reporting discounts in the home market for SKF Cuscinetti and SKF Industrie, S.p.A. meet the standard required for those discounts to be treated as direct selling expenses and subtracted from [foreign market value] or if information on the administrative record does not support deduction as direct expenses, to treat these discounts as indirect selling expenses; to develop a methodology which removes discounts paid on sales of out of scope merchandise from any adjustments made to [foreign market value] for SKF's discounts or, if no viable method can be developed, to deny such an adjustment in its calculation of [foreign market value]; and to develop a methodology which removes discounts paid on FAG's sales of out of scope merchandise from any adjustments made to [United States price] for discounts or, if no viable method can be developed, to deny such an adjustment in its calculation of [United States price].

On September 22, 1993, the ITA filed with this Court its Final Results of Redetermination Pursuant to Court Remand, *The Torrington Company v. United States* Slip Op. 93-125 (July 8, 1993) ("*Remand Results*"). In its Remand Results, the ITA: for certain respondents added to foreign market value ("FMV") the amount of value added tax ("VAT") paid on sales of the subject merchandise in the home market without adjustment and also added the exact same amount to United States price.

("USP"); disallowed SKF Industrie's cash discount adjustment to FMV; granted SKF Cuscinetti's cash discount adjustment as a direct adjustment to FMV and disallowed FAG Cuscinetti S.p.A.'s ("FAG") discount adjustment to USP. *Remand Results* at 3-7.

DISCUSSION

ITA's final results filed pursuant to a remand will be sustained unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States*, 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988).

1. Value Added Tax:

Torrington and Federal-Mogul challenge the ITA's treatment of Italy's VAT. *Torrington's Comments on the Remand Results and Memorandum in Support of Motion for Second Remand* ("*Torrington's Comments*") at 1-2; *Federal-Mogul Corporation's Comments Concerning Defendant's Final Results of Redetermination Pursuant to Court Remand* ("*Federal-Mogul's Comments*") at 1-4.

In its *Remand Results*, as instructed by this Court, the ITA added the amount of VAT paid on each sale in the home market without making a circumstance of sale ("COS") adjustment to this amount. In addition and on its own initiative, the ITA added the exact same amount to USP instead of following its usual practice of applying the *ad valorem* VAT rate to the net USP after all adjustments had been made and adding this amount to USP. *Remand Results* at 3-4; see *Issues Appendix*, 56 Fed. Reg. at 31,729. ITA's rationale for its new approach is based on its interpretation of the United States Court of Appeals for the Federal Circuit's recent decision on the VAT issue in *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1580-82 (Fed. Cir. 1993). *Remand Results* at 3. ITA implemented its stated methodology only for respondents whose dumping margins were being recalculated on remand for some other reason and for respondents who did not participate in the Second Administrative Review because the ITA's new methodology only changes cash deposit rates which are no longer in effect for all respondents. *Id.* at 4-5.

Defendant argues that the ITA's new VAT methodology is responsive to this Court's remand order. Specifically, the defendant argues that this new methodology adds the full amount of VAT to FMV, ensures that the tax adjustment made to USP is not greater than the amount of VAT added to FMV and does not make a COS adjustment to the amount of VAT added to FMV. *Remand Results* at 3; *Defendant's Rebuttal to Torrington's Federal-Mogul's and SKF's Comments on the Remand Results and Opposition to Torrington's Motion for a Second Remand* ("*Defendant's Comments*") at 2.

For a detailed discussion of Torrington, Federal-Mogul and defendant's arguments on this issue, see this Court's decision in *Federal-Mogul Corp. v. United States*, 17 CIT ___, ___, Slip Op. 93-194 at 5-11 (Oct. 7, 1993).

Defendant requests this Court to reconsider its recent decisions in *Federal-Mogul*, 17 CIT ___, Slip Op. 93-194, and *Torrington Co. v. United States*, 17 CIT ___, Slip Op. 93-198 (Oct. 8, 1993), which found that the ITA's new VAT methodology is not in accordance with law.

Defendant-Intervenor, FAG and SKF USA Inc. and SKF Industrie, S.p.A. ("SKF") essentially support defendant's arguments on this issue. *Rebuttal Comments and Memorandum of Defendant-Intervenor FAG Cuscineti SpA in Opposition to Plaintiff's Comments on the Remand Results and Memorandum in Support of Motion for Second Remand ("FAG's Comments")* at 2; *Comments of SKF Regarding Final Remand Results ("SKF's Comments")* at 1-7.

SKF emphasizes that unless the VAT rate is applied to comparable FMV and USP tax bases, application of the VAT rate to USP may result in the creation of dumping margins, a result which SKF contends cannot be allowed pursuant to the Court of Appeals for the Federal Circuit's decision in *Zenith*, 988 F.2d at 1582. *SKF's Comments* at 2-7; *Rebuttal of SKF to Comments of Federal-Mogul and Torrington Regarding Final Results of Redetermination and Opposition to Motion of Torrington for Second Remand* at 2-8.

This Court remanded this issue for the ITA "to add the full amount of VAT paid on each sale in the home market to FMV without adjustment * * *." *Torrington*, 17 CIT at ___, Slip Op. 93-125 at 30. Nowhere did this Court discuss changing the ITA's method of adding an amount to USP pursuant to 19 U.S.C. § 1677a(d)(1)(C) (1988) to account for Italy's VAT. In fact, this Court implicitly affirmed the ITA's methodology for adjusting USP in its discussion of the tax base issue in *Federal-Mogul Corp. v. United States*, 17 CIT ___, ___, 813 F. Supp. 856, 865-66 (1993).

This Court has fully addressed defendant and defendant-intervenor's arguments on this issue and adheres to its decisions in *Federal-Mogul*, 17 CIT at ___, Slip Op. 93-194 at 11-14 and *Torrington*, 17 CIT at ___, Slip Op. 93-198 at 8-10.

Therefore, since as a matter of law the ITA has incorrectly adjusted USP for Italy's VAT, and since there is no just reason for delay in the entry of final judgment on this issue, this Court is entering final judgment on this issue ordering the ITA to apply Italy's VAT rate to USP calculated at the same point in the stream of commerce as where Italy's VAT is applied for home market sales and add the resulting amount to USP.

2. SKF Industrie's Home Market Cash Discounts:

SKF challenges the ITA's denial of an adjustment to FMV for SKF Industrie's home market cash discounts. *SKF's Comments* at 7-12.

In its Remand Results, the ITA denied SKF Industrie an adjustment to FMV for home market cash discounts because the ITA found that

based on the record submitted to us, we have no information that would allow us to segregate discounts on in-scope merchandise from those attributable to out-of-scope merchandise. Because we are unable to develop an appropriate methodology, we denied SKF Industrie's home market cash discount adjustment, as instructed by the Court.

Remand Results at 5-6.

SKF argues that removal of discounts made on sales of out of scope merchandise would yield an identical adjustment factor as would use of the adjustment methodology approved by the Court of Appeals for the Federal Circuit in *Smith-Corona Group v. United States*, 713 F.2d 1568, 1579-80 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984). *SKF's Comments* at 9-11. SKF argues that "an allocation methodology that allocates the total adjustments over total sales may be reasonable as the only manner in which the adjustment can be allocated, and allows no room for distortion or manipulation." *Id.* at 11. Therefore, the ITA should have, at a minimum, allowed SKF Industrie's cash discount claims as indirect selling expenses. *Id.* at 11-12.

Defendant argues that SKF Industrie's allocation methodology is not the same as the methodology approved by the court in *Smith-Corona*, 713 F.2d at 1579-80. In *Smith-Corona*, the rebates at issue were calculated as a fixed percentage of the sales price. In this case, there is no evidence that SKF Industrie's rebates were a fixed percentage of sales price. *Defendant's Comments* at 8-9. In addition, defendant points out that this Court recently affirmed the ITA's rejection of the same allocation methodology as proposed by SKF in *Federal-Mogul*, 17 CIT at ___, Slip Op. 93-194 at 20-22.

Torrington agrees with defendant's arguments on this issue. *Torrington's Rebuttal Comments* at 2.

Defendant and Torrington are correct that the methodology approved by the Court of Appeals for the Federal Circuit in *Smith-Corona*, 713 F.2d at 1579-80, only works if the cash discounts paid to each customer are the same for each sale of in-scope and out of scope merchandise which occurred during the period of review. By definition, this can occur in situations where a respondent made lump sum payments to a customer in regard to all of that customer's purchases. Defendant states that the ITA was unable to find evidence on the administrative record that SKF Industrie had made these types of cash discount payments. *Remand Results* at 5; *Defendant's Comments* at 8-9.

SKF has presented no evidence that the cash discounts paid to each customer by SKF Industrie are the same for each sale of in-scope and out of scope merchandise.

Therefore, ITA's denial of an adjustment to FMV for SKF Industrie's home market cash discounts is in accordance with law and supported by

substantial evidence on the administrative record and is affirmed. *Federal-Mogul*, 17 CIT at ___, Slip Op. 93-194 at 20-22.

3. *FAG's U.S. Market Discounts:*

Torrington challenges the ITA's denial of an adjustment to USP for FAG's U.S. market discounts. *Torrington's Comments* at 3-7.

In its Remand Results, the ITA denied FAG an adjustment to USP for U. S. market discounts because the ITA found that:

Based on the record submitted to us, we have no information that would allow us to segregate discounts on in-scope merchandise from those attributable to out-of-scope merchandise. Because we are unable to develop an appropriate methodology, we denied the adjustment to USP for discounts granted in the U.S. market, as instructed by the Court. We note, however, that denying the adjustment benefits the respondent because it increases USP which, in turn, decreases the dumping margin. We will follow the Court's specific instruction in this remand and deny the adjustment to USP for discounts, even though it decreases FAG's dumping margin.

Remand Results at 6-7.

This Court remanded this issue for the ITA "to develop a methodology which removes discounts paid on FAG's sales of out of scope merchandise from any adjustments made to USP for discounts or, if no viable method can be developed, to deny such an adjustment in its calculation of USP." *Torrington*, 17 CIT at ___, Slip Op. 93-125 at 30.

Torrington argues that, by failing to make any deduction for U.S. market discounts, the ITA departed from longstanding law and administrative practice and rewarded a respondent who was unable to provide the ITA with correct information with a lower dumping margin. *Torrington's Comments* at 3-4.

Torrington points out that this Court realized the need to treat reported price adjustments in a way which provides respondents with an incentive to provide the ITA with complete and accurate information and to provide actual price information as opposed to allocated price information. This may require different treatment of the same type of expenses when calculating USP and FMV. Therefore, when the information provided by a respondent is insufficient, the ITA will make inferences which increase dumping margins. *Torrington's Comments* at 4 (citing *Torrington*, 17 CIT at ___, Slip Op. 93-125 at 24-25).

In this case, Torrington argues that the ITA did not follow its normal procedure of making an adverse inference but, instead, rewarded a respondent who provided deficient information with a smaller dumping margin. *Torrington's Comments* at 4-5.

Torrington argues that the ITA should have used best information available ("BIA") for FAG's U.S. market discounts instead of making no deduction at all. Torrington suggests calculating a substitute discount factor or using the highest reported FAG U.S. discount pursuant to 19 U.S.C. § 1677e(c) (1988), as the ITA did in the most recent administrative review of antifriction bearings. *Torrington's Comments* at 4-7.

Torrington argues that to do otherwise would reward a respondent for deficient reporting of U.S. sales information, provide an incentive for future respondents not to report accurate U.S. sales information and unnecessarily harm the domestic industry. *Id.* at 5-7.

Defendant argues that this Court's Remand Order left it no choice but to deny FAG's reported U.S. market discounts. *Defendant's Comments* at 7-8.

FAG argues that the ITA followed the letter of this Court's Remand Order and that the Remand Results should be affirmed as to this issue. *Fag's Comments* at 3-4.

FAG argues that there is no basis for the ITA to apply BIA to FAG because the Court did not find FAG's reporting to be deficient. *Id.* at 3.

FAG believes that there is no legal basis for treating discounts in the home market and U.S. market differently "provided the reporting methodology in the respective markets is honestly and accurately presented." *Id.* at 4-5 (emphasis in original).

In addition, FAG argues that respondents are always required by law to submit accurate information to the ITA and that the use of BIA will remove any incentive for respondents to report information inaccurately. *Id.* at 5-6.

Finally, FAG argues that, if the Court decides that the ITA did err in denying an adjustment to USP for FAG's U.S. market discounts, the Court should order the ITA to make the adjustment as originally reported by FAG since there is no evidence on the administrative record that FAG reported discounts paid on out of scope merchandise and since FAG's reported discounts were verified by the ITA. *Id.* at 6-9.

In *Torrington*, 17 CIT at ___, Slip Op. 93-125 at 29-30, this Court stated that

if a respondent allocates expenses on a customer-specific basis and does not meet the requirements of *Smith-Corona*, 713 F.2d at 1580, the ITA is allowed to make an adverse inference and treat the expenses in such a way as to encourage the respondent to submit actual expense information in the future. In this case, FAG has allocated its payments of discounts in the U.S. market on a customer-specific basis. AR Italy Pub. Doc. No. 106. There is no contention that FAG has used the same allocation methodology as the one approved in *Smith-Corona* even though FAG alleges that the end result of the two methods is the same. Therefore, the ITA was correct to treat FAG's discounts in the U.S. market as direct selling expenses. However, once again this Court cannot tell from the administrative record whether discounts paid of out of scope merchandise were used to calculate the adjustment to USP for FAG's discounts. Therefore, this issue is remanded to the ITA to develop a methodology which removes discounts paid on FAG's sales of out of scope merchandise from any adjustments made to USP for discounts or, if no viable method can be developed, to deny such an adjustment in its calculation of USP.

The Court has reconsidered its decision to order the ITA to *deny* an adjustment to USP for discounts paid on U.S. sales in a situation, such as here, where discounts paid on sales of out of scope merchandise may have been used to calculate an adjustment to USP. In such a situation, the ITA is required "to make an adverse inference and treat the expenses in such a way as to encourage the respondent to submit actual expense information in the future." *Id.* at 29.

ITA's current administrative practice is to

deduct[] all U.S. discounts, rebates, or price adjustments if actual amounts were reported on a transaction [] specific basis. If these expenses were not reported on a transaction-specific basis, we used BIA for the adjustment and treated the adjustment as a direct deduction from USP.

Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order, 58 Fed. Reg. 39,729, 39,759 (1993); see also *Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Certain Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Review*, 56 Fed. Reg. 26,054, 26,059 (1991).

Therefore, this case is remanded to the ITA to apply its current administrative practice and choose appropriate BIA for this adjustment to FAG's USP and treat the adjustment as a direct selling expense.

CONCLUSION

In accordance with the foregoing opinion, since as a matter of law the ITA has incorrectly adjusted USP for Italy's VAT, and since there is no just reason for delay in the entry of final judgment on this issue, this Court is entering final judgment on this issue ordering the ITA to apply Italy's VAT rate to USP calculated at the same point in the stream of commerce as where Italy's VAT is applied for home market sales and add the resulting amount to USP. This case is remanded to the ITA to apply its current administrative practice and choose appropriate BIA for the adjustment to FAG's USP for U.S. market discounts and to treat the adjustment as a direct selling expense. In addition, the ITA's decisions to grant an adjustment to FMV for SKF Cuscinetti's home market cash discounts and to deny an adjustment to FMV for SKF Industrie's home market cash discounts are affirmed. The second remand results are due within thirty (30) days of the date this opinion is entered. Comments or responses by the parties are due within fifteen (15) days thereafter. Any rebuttal comments are due within fifteen (15) days of the date responses or comments are due.

ABSTRACTED CLASSIFICATION DECISIONS

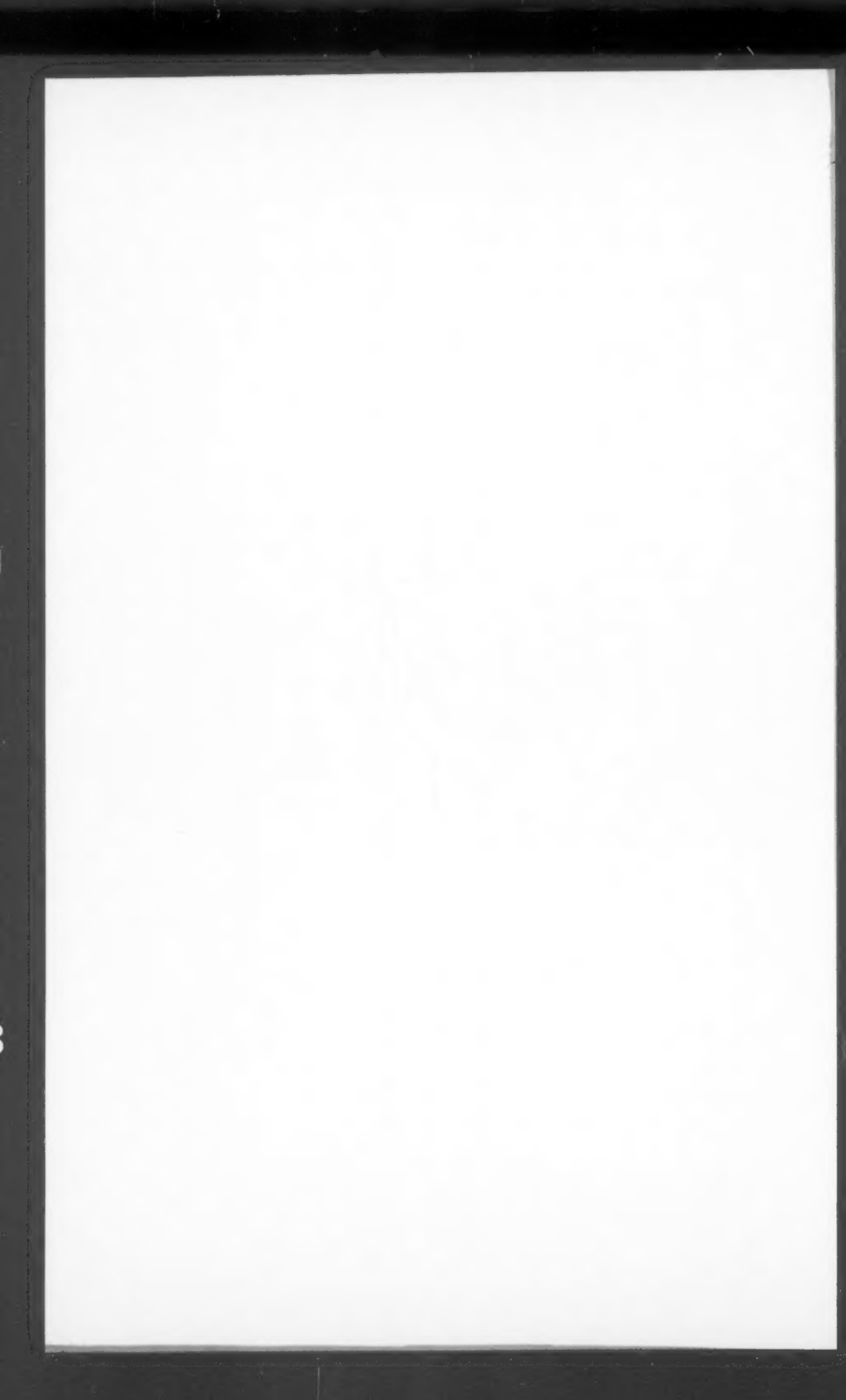
| DECISION NO. DATE JUDGE | PLAINTIFF | COURT NO. | ASSESSED | HELD | BASIS | PORT OF ENTRY AND MERCHANDISE |
|----------------------------------|-----------------|-------------|-----------------------------------|---|--|---|
| C93/149 12/3/93 Carman, J. | Erika, Inc. | 92-10-00653 | 9018.90.70203 Rates not stated | 9917.00.96 Exempt from the assessment | Sec. 24.23 of the Customs Regulations in acor- dance with Sec. 101(B) (4)(B), Title 19 U.S. Cod. Sec. 9501 of P.L. 100-203) | JFK, New York Dialyzers from Ireland |
| C93/150 12/3/93 Carman, J. | La Regale, Ltd. | 90-09-00497 | 4202.22.80 20% | 4202.22.40 8.4% | Agreed statement of facts | Newark, NJ JFK, New York Ladies' handbags |
| C93/151 12/3/93 Carman, J. | La Regale, Ltd. | 91-04-00295 | 4202.22.80 20% | 4202.22.40 8.4% | Agreed statement of facts | Newark, NJ JFK, New York Ladies' handbags |
| C93/152 12/3/93 Carman, J. | La Regale, Ltd. | 91-10-00737 | 4202.22.80 20% | 4202.22.40 8.4% | Agreed statement of facts | Newark, NJ JFK, New York Ladies' handbags |
| C93/153 12/3/93 Carman, J. | La Regale, Ltd. | 92-01-00009 | 4202.22.80 20% | 4202.22.40 8.4% | Agreed statement of facts | Newark, NJ JFK, New York Ladies' handbags |
| C93/154 12/3/93 Carman, J. | La Regale, Ltd. | 92-04-00226 | 4202.22.80 20% | 4202.22.30 8.4% | Agreed statement of facts | Newark, NJ Ladies' handbags |
| C93/155 12/3/93 Carman, J. | La Regale, Ltd. | 92-07-00510 | 4202.22.80 20% | 4202.22.40 8.4% | Agreed statement of facts | JFK, New York Ladies' handbags |
| C93/156 12/3/93 Carman, J. | La Regale, Ltd. | 92-07-00511 | 4202.22.80 20% | 4202.22.40 8.4% | Agreed statement of facts | Newark, NJ Ladies' handbags |
| C93/157 12/3/93 Carman, J. | La Regale, Ltd. | 93-01-00002 | 4202.22.80 20% | 4202.22.40 8.4% | Agreed statement of facts | Newark, NJ Ladies' handbags |

ABSTRACTED CLASSIFICATION DECISIONS (continued)

| DECISION NO. DATE JUDGE | PLAINTIFF | COURT NO. | ASSESSED | HELD | BASIS | PORT OF ENTRY AND MERCHANDISE |
|-------------------------------------|--------------------------|-------------------|--|--|---|--|
| C93/158 12/3/93 Carman, J. | Mattel, Inc. | 93-07-00397 | 9503.49.00202 6.8% | 9503.41.10002 Free of duty | Customs Headquarters Ruling HQ 952514 April 22, 1993 | Los Angeles Stuffed animal toys |
| C93/159 12/8/93 Goldberg, J. | Singer Sewing Company | 92-08-00541 | 8452.10.00, 8452, 845.10.10 not over \$20 each. Other 3.7% | 8452.21, 8452.21.90 Other 2.5% | Plaff American Sales Corp. v. United States Slip Op. 93-101 (June 8, 1993). Court No. 91-03-00202 | Memphis, TN 14U over-edge sewing machines |
| C93/160 12/10/93 DiCarlo, J. | A.T. Clayton & Co., Inc. | 91-03-00230 | 4809.20.20 | 4809.20.40 Free of duty | Agreed statement of facts | Norfolk "Giroform CF" or "Giroform CFB" paper exceeding 36 cm (360 mm) in width |
| C93/161 12/10/93 DiCarlo, J. | A.T. Clayton & Co., Inc. | 91-03-00238 | 4809.20.20 | GIROFORM CF or CFB that exceeds 36cm (360mm) in width 4809.20.40 Free of duty GIRO- FORM CB, CF or CFB equal to or less than 36 cm (360mm) in width 4816.20.00 3% | Agreed statement of facts | Philadelphia "Giroform CF" or "Giroform CFB" paper exceeding 36 cm (360 mm) in width |
| C93/162 12/10/93 Aquilino, J. | Baxter Healthcare Corp. | 91-01-00028, etc. | 9018.39.00 4.2% 9018.90.7070 4.2% | \$70.67 Duty free 9817.00.9600 Duty free | Agreed statement of facts | Chicago, IL, Portland, OR AVF sets, disconnect sets, miniprime sets, CCPD sets and dialyzers |

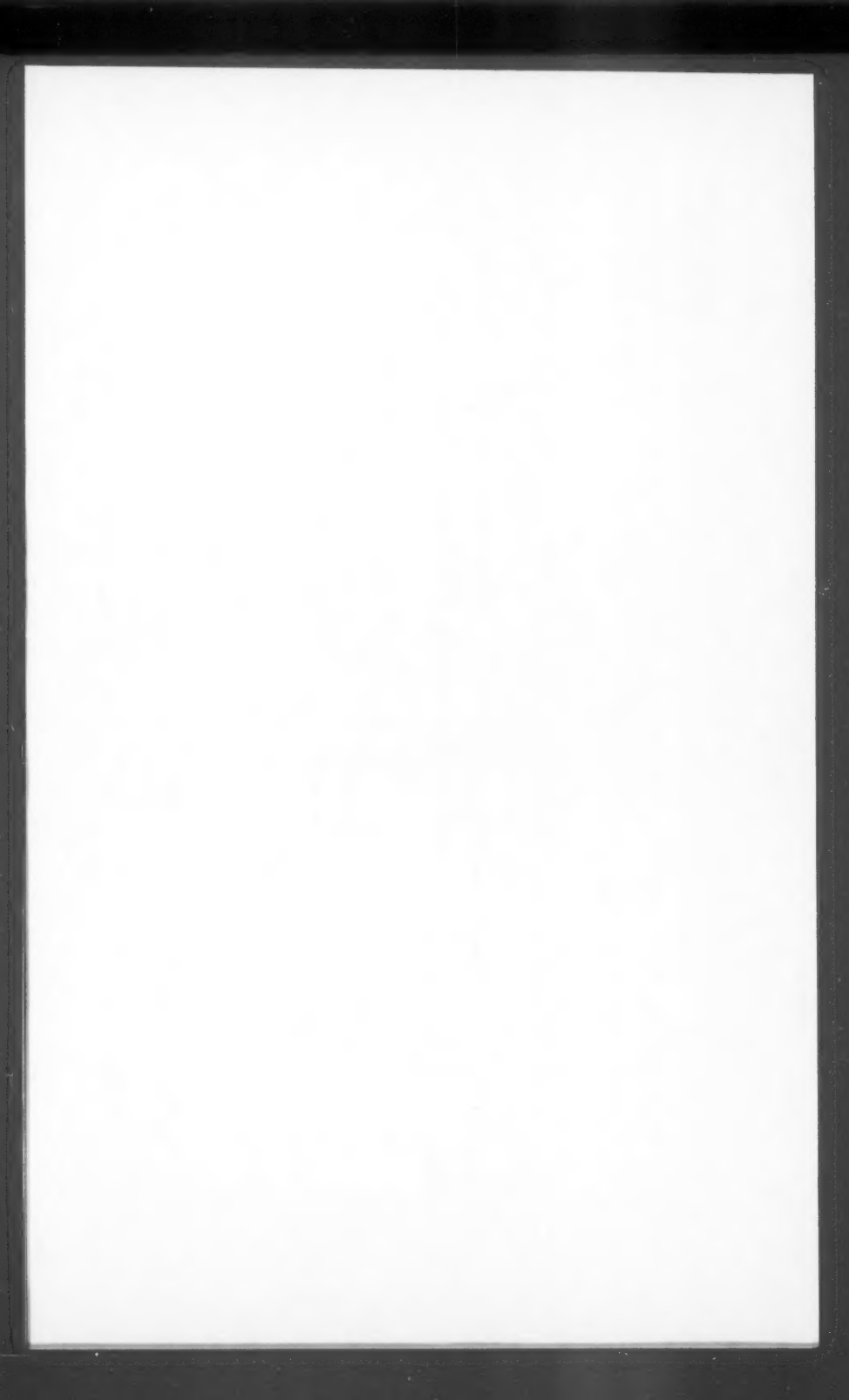
ABSTRACTED VALUATION DECISIONS

| DECISION NO. DATE JUDGE | PLAINTIFF | COURT NO. | VALUATION | HELD | BASIS | PORT OF ENTRY AND MERCHANDISE |
|-----------------------------------|--|-------------|-------------------|---|--|---|
| V93/26 12/8/93 DiCarlo, J. | Supermail Cargo, Inc. | 90-04-00218 | Transaction value | 19 U.S.C. 1401a Charge by the Hong Kong tailors for cut, make and trim garments plus the value of the fabric, materials or other materials plus packing costs in accordance with Customs Service Decisions 81-92 (TAA #8) and 81-72 (TAA #10) | American Air Parcel Forwarding Co. et al. v. United States and non E.C. Made Companies et al. 6 Fed. Cir. (T) 92 1988 | Los Angeles Made-to-measure wearing apparel |
| V93/27 12/10/93 DiCarlo, J. | Synergy Sport Inter- national, Ltd. | 93-01-00044 | Transaction value | Not stated | Agreed statement of facts | Port: Not stated Wearing apparel |
| V93/28 12/10/93 Restani, J. | Synergy Sport Inter- national, Ltd. | 91-05-00337 | Transaction value | \$45.00 per dozen for style 5110/2000 and \$68.00 per dozen for style no. 2038 | Agreed statement of facts | Port: Not stated Wearing apparel |









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